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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 490

FRANK L. YOUNG COMPANY, PETITIONER,

vs.

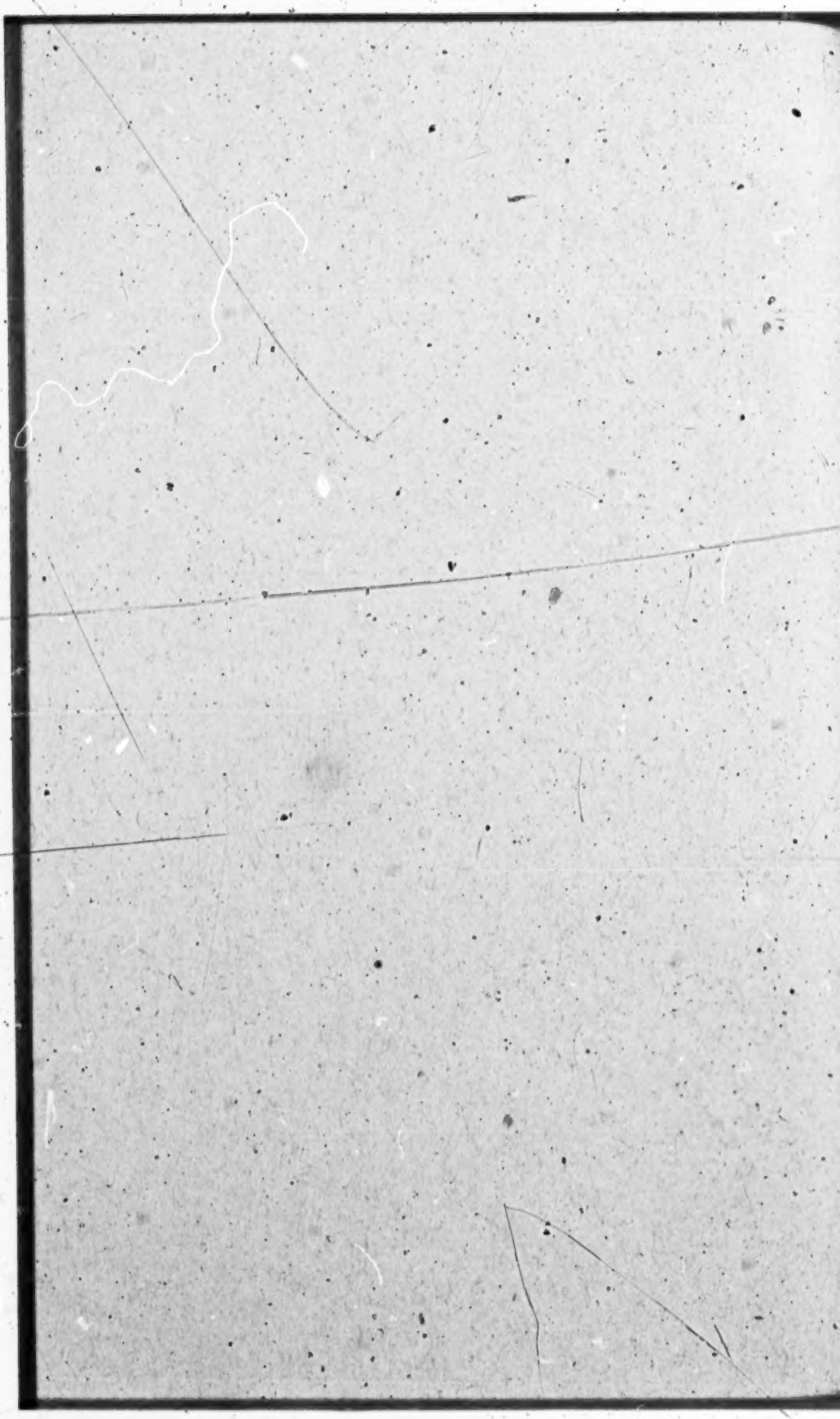
McNEAL EDWARDS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1930

CERTIORARI GRANTED NOVEMBER 24, 1930

(35,412)



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IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 3021. Law

FRANK L. YOUNG COMPANY, Plaintiff,

v.

MCNEAL-EDWARDS COMPANY, Defendant

MOTION FOR SPECIAL PRECEPT—Filed and allowed February 21, 1927

The plaintiff says that no attachment by trustee process, or otherwise, has been made on the goods, effects or credits of the defendant corporation; wherefore it moves/petitions that a special precept issue in the amount of $10,000, returnable —— —, 1927.

By Its Attorneys, Warner, Stackpole & Bradlee.
W. B. L.

[fol. 2] Allowed February 23, 1927. J. A. L., D. J.

IN UNITED STATES DISTRICT COURT

SPECIAL PRECEPT—Feb. 23, 1927

MASSACHUSETTS DISTRICT, ss:

[L. s.]

The President of the United States of America to the Marshal of our District of Massachusetts or his deputies, Greeting:

Whereas in an action pending in the District Court of the United States, for the District of Massachusetts, between the Frank L. Young Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having its usual place of business in Boston, in said District, plaintiff, and the McNeal-Edwards Company,

a corporation organized and existing under the laws of the Commonwealth of Virginia, and a citizen and resident of said Commonwealth, having its usual place of business at Reedville therein, defendant.

Upon motion ex parte by the plaintiff the court has ordered that a special precept issue for the purpose of attaching the goods, effects or credits of the McNeal-Edwards Company, defendant herein, and that you summon McNeal-Edwards Company, defendant herein, to appear and answer to the plaintiff in said action.

We command you, therefore, to attach the goods, effects or credits of said McNeal-Edwards Company, defendant herein, to the value of ten thousand dollars ($10,000), and that you summon the said McNeal-Edwards Company, defendant (if it may be found in your district), to appear before our judges of our said court to be holden at Boston, in said District, on the third Tuesday of March next, to wit: March 15, 1927, to show cause, if any they have, why execution to be issued upon such judgment as the said plaintiff may recover against said defendant in this action (if any) should not issue against the goods, effects or credits of [fol. 3] said McNeal-Edwards Company, defendant, and make return of this writ on or before said third Tuesday of March next, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, this twenty-third day of February, in the year of our Lord one thousand nine hundred and twenty-seven.

John E. Gilman, Jr., Deputy Clerk.

IN UNITED STATES DISTRICT COURT

OFFICER'S RETURN ON SPECIAL PRECEPT

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, February 25, 1927.

Pursuant hereunto and by virtue of a special precept issued from the United States District Court at Boston, Mass., said district, I this day attached eleven hundred steel drums at 888 East First Street, South Boston, Mass.,

said district, as the property of the within-named McNeal-Edwards Company, defendant, and afterwards on the same day I deposited a true and attested copy of this precept in the city clerk's office, city of Boston and district of Massachusetts, and afterwards on the twenty-sixth day of February, 1927, I summoned the within-named McNeal-Edwards Company to appear at court as within directed by delivering in hand at Boston, Mass., said district, to Asa P. French, Esq., attorney of record for the within-named McNeal-Edwards Company, a true and attested copy of this precept.

William J. Keville, U. S. Marshal, by James Fraser, Deputy.

Service $4, travel .24, paid City Clerk .25—$4.49.

The writ in this cause is dated January 4, 1927, and was entered late by order of court on March 22, 1927, and is as follows:

[fol. 4] IN UNITED STATES DISTRICT COURT

WRIT AND RETURN

MASSACHUSETTS DISTRICT, ss:

[SEAL.]

The President of the United States of America to the Marshal of our District of Massachusetts or his deputy, Greeting:

We command you to attach the goods or estate of McNeal-Edwards Company, a corporation organized and existing under the laws of the Commonwealth of Virginia and a citizen and resident of said Commonwealth, having its usual place of business at Reedville therein; which corporation cannot be found to be served with process; which corporation has brought an action, wherein Asa P. French is attorney of record for the plaintiff, in the District Court for our District of Massachusetts; in which action the demands are of such a nature that the judgment or execution therein may be set off against the judgment or execution herein;

to the value of twenty thousand dollars, and for want thereof to summon the said McNeal-Edwards Company (if it may be found in your district), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of March, 1927, then and there, in our said Court, to answer unto Frank L. Young Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts and a citizen and resident of said Commonwealth, having its usual place of business in Boston therein; said summons to be made by serving this Writ on Asa P. French who has a usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts, as said French is attorney of Record as aforesaid; in an action of contract to the damage of the said Frank L. Young Company (as it says) the sum of twenty thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, the fourth day of January, in the year of our Lord one thousand nine hundred and twenty-seven.

James S. Allen, Clerk.

[fol. 5] Officer's Return on Writ

United States of America,
Massachusetts District, ss:

Boston, January 5, 1927.

Pursuant hereto I have this day attached a chip as the property of the within named McNeal-Edwards Company, and thereafter on the same day I summoned the within named McNeal-Edwards Company to appear at Court as within directed by giving in hand to Asa P. French, attorney of record of said McNeal-Edwards Company, at Boston, in said District, copy of an original summons of this writ.

William J. Keville, U. S. Marshal, by Thomas J. Pyne, Deputy.

Service $2; travel, .06—$2.06.

In United States District Court

Declaration—Filed March 22, 1927

Plaintiff says that it is a corporation organized and existing under the laws of the Commonwealth of Massachusetts

and is a citizen of said Commonwealth; that the defendant company is a corporation organized and existing under the laws of the Commonwealth of Virginia and is a citizen of said Commonwealth, and that the matter in controversy, exclusive of interest and costs, exceeds three thousand dollars ($3,000). Plaintiff further says that an action was brought by the defendant company against the plaintiff company in this Court and is now pending, and that the number of said action is Law 2071; that the defendant company is not an inhabitant of this Commonwealth and cannot be found in this district to be served with process; that the demands in the present action and in the said former action are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other, and that the demands rise out of the same transaction; that Asa P. French was and is the attorney of record for the plaintiff in the said former action.

[fol. 6] Count 1. Plaintiff says that on or about January 3, 1922 the plaintiff was engaged in the business of refining Prime "A" Crude Menhaden Fish Oil and producing therefrom pressed fish oil; that on or about said date the defendant sold or contracted to sell to the plaintiff and the plaintiff bought or agreed to buy by description, 1,000 to 1,200 barrels of Prime "A" Crude Menhaden Fish Oil at 33 cents per gallon in sellers' drums F. O. B. Baltimore which oil on last analysis showed about four percent free fatty acid. Plaintiff says that pursuant to the aforesaid contract, the defendant delivered 1,107 barrels of oil to the plaintiff, but that the oil so delivered was not Prime "A" Crude Menhaden Fish Oil but an oil of another and inferior grade and of a much lower market value, and the aforesaid oil in no way complied with the warranties in the aforesaid contract. And the plaintiff says that it has done all things required by it to be done under the said contract, and that it gave to the defendant notice of the failure of said oil to comply with the said warranties, within a reasonable time. And the plaintiff says that due to the failure of said oil to comply with the warranties of the contract, it was unable for a long time to remove the said oil from the barrels, that it was put to great expense and inconvenience by being obliged to store the aforesaid oil and barrels; that it was put to greatly increased expense in processing the said oil; that the processed product of this oil was of a greatly in-

ferior grade and of much less market value than the processed product of oil complying with the warranties of the contract would have been; and that it was otherwise damaged to the extent alleged in its writ.

Count 2. The plaintiff says that on or about January 3, 1922, it was engaged in the business of pressing fish oil and contracted with the defendant, all as more particularly alleged in Count 1; that the said fish oil was bought by description; that the defendant is a dealer in goods of that description; and that there was an implied warranty by the defendant of the merchantability of said oil. But that the said oil was not merchantable. And the plaintiff says that it has performed its part of said contract, has given notice [fol. 7] of the breach of warranty to the defendant, and has been greatly damaged, all as more particularly alleged in Count 1.

Count 3. The plaintiff says that on or about January 3, 1922, it was engaged in the business of pressing fish oil and contracted with the defendant, as more particularly alleged in Count 1; that the plaintiff made known to the defendant the particular purpose for which this oil was required and relied upon the defendant's skill and judgment; and that there was an implied warranty by the defendant that the goods should be reasonably fit for the purpose for which they were required by the plaintiff. But the said oil was not reasonably fit for such purpose. And the plaintiff says that it has complied with its duties under the said contract, that it has given notice of the breach of warranty to the defendant, and that by the breach of warranty the defendant has been damaged, all as more particularly alleged in Count 1.

By its Attorneys, Warner, Stackpole & Bradlee, W. B. Leach, Jr.

IN UNITED STATES DISTRICT COURT.

MOTION TO DISMISS—Filed March 24, 1927

Now comes the defendant in the above entitled action and, appearing specially, moves the court to dismiss the same on the ground that the defendant is not a citizen or

resident of the Commonwealth of Massachusetts, but was at the time of the beginning of this suit, and is, a citizen and resident of the Commonwealth of Virginia, and that no valid service has been made upon the defendant, as appears upon the face of the writ and the declaration in said action, and as disclosed by the records of this court in case No. 2054 Law, Frank L. Young Company v. McNeal-Edwards Company, and case No. 2071 Law, McNeal-Edwards Company v. Frank L. Young Company, a copy of the declaration in each of which is hereby annexed marked "A" and "B" respectively.

By Its Attorney, Asa P. French.

[fol. 8] EXHIBIT "A" TO MOTION TO DISMISS

FRANK L. YOUNG COMPANY

v.

THE MCNEAL-EDWARDS COMPANY

Plaintiff's Declaration

Count 1. And the plaintiff says that on or about January 3, 1922, the defendant contracted to sell to the plaintiff and the plaintiff agreed to buy one thousand (1,000) to twelve hundred (1,200) barrels of Prime A Crude Manhaden Fish Oil at thirty-three cents (33c) per gallon in seller's drums delivered in Baltimore. And the plaintiff further says that pursuant to the aforesaid contract the defendant in fact delivered one thousand one hundred and seven (1,107) barrels of oil to the plaintiff; but that the oil so delivered was not "Prime A Crude Manhaden Fish Oil" but an oil of another and inferior grade, and of a much lower market value, and the aforesaid oil in no way complied with the warranties in the aforesaid contract. And the plaintiff says that due to the inferior grade of the oil so delivered it was unable for a long time to remove the same from the aforesaid barrels, was put to great expense and inconvenience by being obliged to store the aforesaid oil and barrels; was unable to meet the demands of its customers, lost the profit which it might have made had this oil been in accordance with the specifications of the contract, and was

otherwise injured, all to the plaintiff's great damage, for the recovery of which damage the plaintiff brings this action.

By Its Attorneys, Warner, Stackpole & Bradlee.

EXHIBIT "B" TO MOTION TO DISMISS

McNEAL-EDWARDS COMPANY

v.

FRANK L. YOUNG COMPANY

Plaintiff's Declaration

First Count (in contract). And the plaintiff says that on or about the third day of January, 1922, it sold to the defendant eleven hundred and seven (1107) barrels of Prime "A" Crude Menhaden Fish Oil, and shipped the same from its plant in Reedville, Virginia, to the defendant at Boston, [fol. 9] in containers known to the trade as drums; that it was a part of the defendant's obligation under the contract for said sale forthwith to remove the oil from said drums and to return the latter, freight prepaid, to the plaintiff at said Reedville; but the plaintiff has refused and neglected and still refuses and neglects to return said drums to the plaintiff as aforesaid to the great damage of the plaintiff as set forth in its writ.

Second Count (in tort). And the plaintiff says that on or about the twenty-third day of July, 1922, the defendant wrongfully converted to its own use eleven hundred and seven (1107) containers or drums of the value of three dollars and fifty cents ($3.50) each, belonging to the plaintiff, to the plaintiff's great damage as set forth in its writ.

McNeal-Edwards Company, by Its Attorneys, Asa P. French, Jonathan W. French. Clarence S. Towles, of Counsel.

Also on said twenty-fourth day of March, a plea in abatement was filed, said plea being subsequently amended on April 4, 1927, and as amended being as follows:

IN UNITED STATES DISTRICT COURT

DEFENDANT'S PLEA IN ABATEMENT AS AMENDED—Filed March 24, 1927

Now comes the defendant, McNeal-Edwards Company, and, without waiving its special appearance, but relying thereon, and without submitting itself to the jurisdiction of the court, says that it ought not to be held to answer, or to proceed further, in this suit for the following reasons:

(1) That on the date of the bringing of this action, to wit, January 4, 1927, there was pending in this court another suit, No. 2054 Law, between the same parties for the same cause of action, which suit was discontinued, without notice to this defendant, on February 28, 1927.

(2) That in January, 1922, the defendant, a corporate citizen and resident of Virginia, having no place of business [fol. 10] in Massachusetts, sold and shipped to the plaintiff, Frank L. Young Company, a Massachusetts corporation, a quantity of crude Menhaden oil. The plaintiff paid for the oil in accordance with the terms of the contract and, subsequently, in or about October, 1922, brought suit against this defendant, in the Superior Court for Suffolk County, Massachusetts, predicating jurisdiction in that court solely upon an attachment made by it of the containers, 1107 in number, then in its possession, in which the oil was shipped. McNeal-Edwards Company thereupon removed the suit so restricted to this court, entered a special limited appearance, and filed an answer a copy of which is hereto annexed marked "A". Shortly thereafter it brought a cross-action in this court to recover the value of the containers, alleged in the declaration to be $3,874.50.

These two suits have, for various reasons, not been brought to trial, and, on or about January 4, 1927, without discontinuing its original action, Frank L. Young Company brought suit in this court for the same cause of action as that alleged in the original suit, and seeks thereby to obtain unrestricted venue not limited to the value of said containers.

Process of the present suit was served upon plaintiff's attorney in the cross-action to the original suit.

And the defendant says that such service, under the circumstances heretofore alleged, cannot operate to give the

plaintiff the right to satisfy a judgment, if any, against any property of the defendant except said containers, but for the presence of which in Massachusetts it would have been obliged to bring its original action in Virginia.

And the defendant further says that the service attempted to be made upon it in this case is void and of no effect, for the reason that a party bringing suit against a non-resident in a state court, and then claiming jurisdiction upon the sole ground that the defendant in such suit has property in this Commonwealth which can be attached, cannot, if the suit is removed to the Federal Court, and a cross-action is instituted there, bring another suit, with or without discontinuing the original suit, for the same cause [fol. 11] of action, and thereby vest unrestricted jurisdiction in the Federal Court, by serving process therein upon the attorney for the plaintiff in such cross-action.

By Its Attorney, Asa P. French, Appearing Specially.

March 23, 1927.

Then personnally appeared the above-named Asa P. French and made oath that the facts alleged in the foregoing plea in abatement are true, before me,

George W. Aberle, Notary Public. (Seal.)

I, Asa P. French, attorney for the defendant, appearing specially, certify that the above plea in abatement is interposed in good faith and not for the purpose of delay.

Asa P. French.

EXHIBIT "A" TO PLEA IN ABATEMENT

DISTRICT COURT OF THE UNITED STATES DISTRICT OF MASSACHUSETTS

Law. No. 2054

FRANK L. YOUNG COMPANY

v.

MCNEAL-EDWARDS COMPANY

Defendant's Answer

Now comes the defendant in the above-entitled cause—without submitting its person to the jurisdiction of this

Honorable Court, but invoking such jurisdiction only for the purpose of protecting its property seized on attachment in the State court from which this suit has been removed—and denies each and every allegation in the plaintiff's writ and declaration contained.

By Its Attorney, Asa P. French. Clarence S. Towles, Reedville, Virginia, of Counsel.

[fol. 12] IN UNITED STATES DISTRICT COURT

REPLICATION TO PLEA IN ABATEMENT—Filed April 11, 1927

Now comes the plaintiff and replying to the defendant's plea in abatement as amended and says:

1. That there was pending on January 4, 1927, another suit between the same parties for the same cause of action numbered 2054 Law on the docket of this court; that no personal jurisdiction was obtained over the defendant in that action and that no judgment could have been given in that action, except that the property attached in that action be sold and the plaintiff satisfied as far as possible from such property; that the McNeal-Edwards Company commenced against the Frank L. Young Company an action in this court growing out of the same transaction as the plaintiff's said action, and that McNeal-Edwards Company obtained personal jurisdiction over Frank L. Young Company, in that action; for the purpose of curing the defect of personal jurisdiction in the plaintiff's former action, and for the purpose of putting the parties on an equal footing so that the controversies between them might be finally adjudicated, the present action was brought and personal jurisdiction obtained by service on the attorney of record in the McNeal-Edwards Company's said action under General Laws of Massachusetts, Chapter 227, Sections 2 and 3, and Rule 53 of this court.

By Its Attorneys, Warner, Stackpole & Bradlee, W. B. Leach, Jr.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

April 11, 1927.

Then personally appeared the above-named W. B. Leach, Jr., and took oath that the facts stated by him in the above replication are true.

Before me,

Foster E. Allison, Notary Public. (Seal.)

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF HEARING

On the said eleventh day of April, this cause came on to [fol. 13] be heard on the defendant's motion to dismiss, the Honorable James A. Lowell, District Judge, sitting, and after due consideration thereon had, a memorandum of the court was filed,—denying the motion to dismiss.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 22, 1927

Now comes the defendant in the above-entitled cause and, without waiving its motion to dismiss and its plea in abatement, as amended, filed therein, denies each and every allegation in the plaintiff's writ and declaration contained.

And further answering the defendant says that the oil which was furnished by the plaintiff to the defendant, and is referred to in the plaintiff's declaration, was of the quality and description which the plaintiff ordered and the defendant agreed to furnish.

And further answering the defendant says that, with respect to the quality and description of the oil which it sold to the plaintiff, the plaintiff is bound under the contract by the gauging and analysis made by George L. Thompson and Gascoyne & Company, or either of them, who were designated by the plaintiff as its agents and representatives for that purpose.

And the defendant further says that the plaintiff, before action brought, accepted the discount provided by the contract in case of excess of free fatty acids, and has adjusted

its claim against the defendant by deducting such discount, and paying the defendant the difference between that amount and the purchase price.

By Its Attorney, Asa P. French. Clarence S. Towles, of Counsel.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

On the twenty-sixth day of said April, a further memorandum of the court was filed, overruling the plea in abatement.

This cause was thence continued from term to term to the December Term, A. D. 1928, when, to wit, February 7, 1928, issue being joined, a jury was duly empanelled and [fol. 14] sworn according to law to try the issue, the Honorable James M. Morton, Jr., District Judge, sitting.

Said cause thereupon came on to be heard on the seventh, eighth, ninth and tenth days of February, A. D. 1928, together with case No. 2071 Law, McLean-Edwards Co. v. Frank L. Young Co. et al.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION THAT A VERDICT BE DIRECTED IN ITS BEHALF—Filed February 10, 1928

And now comes the defendant in the above-entitled cause and, at the close of all the evidence, moves the court to direct the jury to return a verdict for the defendant.

McNeal-Edwards Company, by Its Attorney Asa P. French.

IN UNITED STATES DISTRICT COURT

ALTERNATIVE VERDICT—February 10, 1928

The jury find for the plaintiff and assess damages in the sum of ten thousand seven hundred thirty and 17/100 dollars;

But if, as a matter of law, the plaintiff is not entitled to a verdict, then the jury find for the defendant and consent that this alternative verdict may be entered on order of the United States District Court for the District of Massachusetts, or of the United States Circuit Court of Appeals for the First Circuit, or of the Supreme Court of the United States, with the same effect as if returned by them.

Harles Bailey, Foreman.

[fol. 15] IN UNITED STATES DISTRICT COURT

SPECIAL FINDINGS—Feb. 10, 1928

The following special questions are put to the jury and answered by them as follows:

1. Was the oil delivered by the McNeal-Edwards Company to the Frank L. Young Company of the quality and grade called for by the contract sued upon?

The jury answer: No.

2. If not, what is the amount of the damages sustained by the Frank L. Young Company by reason of inferiority in the quality or grade of the oil delivered?

The jury answer: $10,730.17.

Charles Bailey, Foreman.

IN UNITED STATES DISTRICT COURT

MOTION IN ARREST OF JUDGMENT—Filed February 14, 1928

Now comes the defendant in the above-entitled cause, after verdict and, appearing specially, moves that judgment therein be arrested on the grounds—

(1) That it appears upon the record that this court has never acquired jurisdiction of this defendant;

(2) That it appears upon the record that the service made upon the defendant's attorney was void and of no effect;

(3) That it appears upon the record that the District of Massachusetts is not the proper venue for hearing and determining said cause; and

(4) That the alternate or conditional verdict rendered by the jury, at the request or direction of the court, was a violation of the defendant's right to that trial by jury secured to it by the Seventh Amendment to the Constitution of the United States.

McNeal-Edwards Company, by Its Attorney, Asa P. French, Appearing Specially.

[fol. 16] April 9, 1928.—Motion denied. Exception saved. J. M. M., Jr.

This cause was thence continued to the March Term, A. D. 1928, when, to wit, April 9, 1928, the aforementioned motion in arrest of judgment was denied, exception being saved.

On the ninth day of April, A. D. 1928, a draft bill of exceptions was filed by the defendant.

This cause was thence continued to the June Term, A. D. 1928, when, to wit, July 6, 1928, a substituted bill of exceptions was filed and allowed by the court.

IN UNITED STATES DISTRICT COURT

AGREEMENT FOR JUDGMENT—Filed November 27, 1928

In the above-entitled cause it is agreed that judgment may be entered forthwith upon the verdict.

Warner, Stackpole & Bradlee, Attorneys for Plaintiff. Asa P. French, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Thereupon, to wit, November 27, 1928, it is considered by the court that the said Frank L. Young Company, plaintiff, recover of the said McNeal-Edwards Company, defendant, the sum of ten thousand seven hundred thirty dollars and seventeen cents ($10,730.17) damages, together with interest amounting to five hundred thirteen dollars and twenty-

six cents ($513.26), and its costs of suit taxed at ninety-three dollars and forty-eight cents ($93.48).

[fol. 17] IN UNITED STATES DISTRICT COURT

Defendant's Substituted Bill of Exceptions—Filed and Allowed July 6, 1928

This is an action of contract. The writ and pleadings are made a part hereof.

STATEMENT OF FACTS

The facts material to this bill of exceptions are as follows:

In January, 1922, the defendant, a corporate citizen and resident of Virginia, having no place of business in Massachusetts, sold through a merchandise broker in Baltimore and shipped to the plaintiff, Frank L. Young Company, a Massachusetts corporation, a quantity of Menhaden oil. The plaintiff received the oil, paid for it as hereafter stated, and subsequently in or about October, 1922, brought suit for a breach of warranty in the Superior Court for Suffolk County, Massachusetts, predicating jurisdiction in that court solely upon an attachment made by it of the containers, 1,107 in number, then in its possession in which the oil had been shipped to it by the defendant. McNeal-Edwards Company thereupon removed the suit, so restricted, to this court, entered a special limited appearance and filed an answer. Shortly thereafter, on March 20, 1923, it brought an action in this court to recover the value of the containers alleged in the declaration to be $3,874.50. While these suits were pending, on or about January 4, 1927, Frank L. Young Company brought suit in this court and seeks thereby to obtain an unrestricted venue not limited to the value of said containers.

The original suit, brought in the Superior Court for Suffolk County and removed to this court, was discontinued on February 28, 1927.

Process of the present suit was served upon Asa P. French, the plaintiff's attorney in the action of McNeal-Edwards Company against Frank L. Young Company,

whereupon, on March 24, 1927, McNeal-Edwards Company filed a plea in abatement, a copy of which as amended is hereto annexed marked "B", on the ground, in substance, that such service, under the circumstances hereto alleged, did not operate to give the plaintiff a right to satisfy a judgment, if any, against any property of the defendant ex- [fol. 18] cept said containers, but for the presence of which in Massachusetts it would have been obliged to bring the original action in Virginia; and that therefore the service attempted to be made upon it (McNeal-Edwards Company) in the person of its attorney in this case was void and of no effect.

The plea in abatement was overruled by Lowell, J., and the defendant duly excepted to said ruling. Thereafter the defendant filed an answer of which a copy is hereto annexed marked "A". Thereafter, to wit, during the December, 1927, term, the two cases, Frank L. Young Company v. McNeal-Edwards Company and McNeal-Edwards Company v. Frank L. Young Company, came on trial before Morton, J., and a jury.

Copies of the docket entries in the cases of Frank L. Young Company v. The McNeal-Edwards Company, No. 2054; McNeal-Edwards Company v. Frank L. Young Company, No. 2071; and Frank L. Young Company v. McNeal-Edwards Company, No. 3021, are hereto annexed and marked "C", "D" and "E"; and copies of the plaintiff's declaration and specifications in the case of McNeal-Edwards Company v. Frank L. Young Company are annexed and marked "F" and "G".

The following is, in substance, all the testimony adduced in the trial of the case of Frank L. Young Company v. McNeal-Edwards Company, No. 3021.

The plaintiff offered in evidence

EXHIBIT 2

"Purchase Order

No. B 1002

Boston, Mass., January 5, 1922.

Frank L. Young Company, 111 Purchase Street Boston, Mass., to Reilly-Edwards Co., Address Baltimore, Md.

Ship to Frank L. Young Company at Boston, Mass.
Ship via M. & M. T. Co. When wanted: Late this month.

[fol. 19]

Quantity	Description	Price
1000 to 1200 Bbls.	Prime 'A' Crude Menhadne [sic] Fish Oil (McNeal-Ed-Co. make—guaranteed under 5% acidity) If, however, Gascoyne's test shows sample drawn by Geo. A. Thompson at time of gauging to be in excess of 5% acidity, sellers are to make the customary allowance of one cent (1c) per gallon for each per cent or fraction thereof above 5% F. F. A. Oil to be gauged and sampled by Geo. A. Thompson at time of shipment. Oil to be furnished in drums, drums to be returned to sellers, freight prepaid.	33c per gal. in sellers drums f. o. b. Baltimore cash against documents not including drums.

Frank L. Young Company by C. J. Murphy."

and

EXHIBIT 1A

Broker's Note

Merchandise Sold

"One Thousand to Twelve Hundred Barrels (1,000 to 1,200 Barrels of Prime 'A' Crude Menhaden Fish Oil, last

analysis of which showed above 4% Free Fatty Acid, at Thirty-Three Cents (33c) per gallon, in sellers drums, delivered, Baltimore, Md. Drums to be returned to sellers, freight prepaid.

If Gascoyne & Company's test of sample drawn by Geo. A. Thompson, at time of gauging, show free fatty acid in excess of 5%, sellers to make customary allowance to buyers for each One Per cent, or fraction thereof, above 5% Free Fatty Acid.

[fol. 20] For shipment late in January 1922.

To be gauged and sampled by Mr. Geo. A. Thompson at time of shipment.

Terms: Cash against documents.

Buyers and sellers not responsible for any contingencies arising beyond their control.

Brokerage payable by sellers to Reilly-Edwards Company.

Reilly-Edwards Company, Frank S. Reilly, Brokers."

Cedric F. Lee, sworn by the plaintiff, testified that between August 21 and December 24 he was employed by the plaintiff as plant superintendent in South Boston; that he was graduated from Tufts College Engineering School with degree of Bachelor of Science and Chemical Engineering; was with L. Kemp Sons, grease soap manufacturers, in Cambridge, for a year; was with Aetna Explosives Company for nearly a year; with United States Government in explosive inspection department for about a year; with Proctor & Gamble Company at their Staten Island plant, in charge of their cottonseed oil refinery for a year; then with the Dupont Company for approximately a year; and then with Frank L. Young Company; that pressed fish oil is one of its products; that it was produced from Crude Menhaden Fish Oil, with which he was familiar, and also was familiar with the qualities of Prime A Crude Menhaden Fish Oil. Pressed Fish Oil is a trade-name for their refined product. There is another product obtained from Crude A Menhaden Oil known as stearin. [Witness is shown small bottle.] The contents of this bottle have the peculiar appearance of Crude A Fish Oil. It looks like Prime A Menhaden Fish Oil. It would require a chemical test to determine the acid

content of the sample in the bottle. The whitish matter in the bottom of the bottle is known as "foots". The amount of foots can be determined by visual inspection after sufficient settling. It is from that product that stearin [fol. 21] is made. Percentage of foots at a temperature of 50 to 80 degrees in Prime A Crude Menhaden Fish Oil would be 8 percent, in some lower and in some higher, the maximum being 15 percent in Prime A.

[Witness is shown another bottle of oil.]

"Q. 1. What has that oil the appearance of being?

A. It has the appearance and odor of pressed Menhaden Fish Oil."

That is ~~the~~ product that Frank L. Young Company produced.

Mr. Leach: I show you here a photograph marked "4 for identification".

That represents a drum and a dumping. The crude oil in this particular case arrived in drums, and was dumped into a dumping-tank. Picture shows the dumping process. Right under the bung of the drum there is a wire strainer for the purpose of catching solid matter such as wooden chips and any solid material that might be in the oil, that is not oil. The oil is dumped into a tank through very course strainers. From the dumping-tank the oil goes to the heating-tank where it is subjected to heat between 120 and 130 Fahrenheit. It is then put into a chilling-tank where it is allowed to cool. From the chilling-tanks the oil is drawn into strainers, where the pressed oil and the clear oil separate from the "foots" by gravity and flows into the tank below. The clear oil goes through a strainer and the solid fat is held within. The clear is pressed fish oil. The solid fat is then removed from the strainer and put into canvas press bags and pressed in a lever press for the purpose of expelling any further free oil from the solid fat. In the bag we have the stearin. I was in the Frank L. Young Company's plant when the 1,107 drums of McNeal-Edwards oil arrived, and took a sample of it, three or four days, or a week, afterward. I took the first sample from one drum in five, and later from all the drums——

"Q. 2. Did the results obtained from those samples coincide?

Mr. French: One moment——

The Court: Yes, why not? You mean it is a little leading?

Mr. French: No; I object on the ground that the plaintiff is bound by, and cannot attack, the gauging and sampling of the oil in controversy made by George A. [fol. 22] Thompson, the gauger and sampler designated by it in its purchase order (Exhibit 2, supra) to perform that service for it. He certified that it was 'A Crude Menhaden Oil.'

The Court: Well, it lies in my mind this way: that the suggestion is that the contract removes any point of doubt or debate about the quality of goods shipped because the contract appoints a certain person as arbitrator, to decide that question once and for all. Now, it is quite clear that if a term of that sort is intended to be inserted in the contract it should be put in there clearly so that it is there for anybody to read and see. I don't think this contract means that test at all. It does say, as to acidity, that Gascoyne's test is to be accepted by the parties and adjustment is to be made on the basis of it. Beyond that, it says that the oil is to be gauged and sampled by Thompson, but there is no statement that the grading is to be accepted by the parties as Thompson's grading, or anything equivalent to that. I am against you, Mr. French. I will save your exception, Mr. French, and let the evidence in.

The Court: The question is, as you put it, Mr. French, really, whether that cuts out any discussion between the parties afterward as to the grade; that is really what it comes to?

Mr. French: Yes; the plaintiff was to be bound by the gauging and sampling of Thompson, the gauger, selected by it.

The Court: I will save your exception Mr. French, and let this in."

The Witness: I tested the oil for free fatty acid, and observed it for a percentage of "foots". There was no actual test we could perform. It was an observation test.

"Q. 3. What did you observe at that time as to the percentage of foots?

Mr. French: Do I need to repeat my objection to this line of testimony?"

[That by the terms of the contract the plaintiff was bound by, and could not repudiate, the tests made by Gascoyne and the gauger and sampling of George A. Thompson.]

"The Court: Your objection is very basic and I will save you any rights that you may have."

[fol. 23] The witness answered 80 percent of foots.

The oil was pressed several months later, in July or August, 1922. It had been received the latter part of January. We attempted to dump it from the drums during the winter months. We first attempted to take the oil from the drums in July or August because in the first place there was a dispute between the sellers and the purchasers, and the instructions were to hold off until some settlement had been reached,—or some sort of agreement had been reached,—and in the second place it would have been impossible to do so in the cold weather. It is possible to dump drums of Prime A Menhaden Oil in cold weather. The product observed in those drums by means of our sampling process was not Prime A Crude Menhaden Oil. I observed it being dumped from the drums in July and August, 1922. It looked whitish and looked pasty instead of the usual brownish and red color of fish oil. In the summer time it takes from one to five minutes and in the winter it takes from five to ten minutes to dump a drum of Prime A Menhaden Oil. I should say it took half an hour to dump this and some went even an hour or an hour and a half. Of course there were exceptions that took less time, but they were exceptions. The average time, I should say, half an hour per drum. I directed the men to stir the drums with rods to try to loosen up the material. After the drums were dumped they were taken to the heating-tanks. In addition to a yellowish, whitish mass, we observed several large lumps, some fish heads, and one whole fish. After the heating process the oil was dumped into the cooling-tanks, and put through the regular cooling process. We could not get it out of the chilling-tanks and cut down the time of chilling so the mass would not cool to the normal temperature of 50 to 60 degrees. It would then flow by the aid of a rod through the outlet. From the chilling-tanks it then flowed into the strainers. The strainers were burlap bags, about 18 inches across the top by two feet deep and 20 to 24 feet long, on a frame holding approximately five

barrels. In case of ordinary Prime A Crude Menhaden Oil, after setting all night there is left in the strainer one-half to one barrel. After the McNeal-Edwards oil had set [fol. 24] all night, there was left practically the same amount we put in. Practically no oil soaked through. We then removed it from the strainers and put in the press bag. Press bags were about two feet high and a foot and a half across. They are filled about half full and then piled up with steel places between them into what is called a "bay" until you have about 24 or 25 bags high, and then pressure is placed on top of the steel plates. One of these bays holds about three barrels, and the pressing process on Prime A Oil occupies ordinarily two days. With two days' pressing the McNeal-Edwards lot of oil was about three-quarters of the original height, as against one-quarter or a third for Prime A Oil. After we had done as much process pressing as we could, we processed it for stearin, that is neutralized it with stock to produce a refined stearin below 5 percent Free Fatty Acid. The final nature of what we get in the bag after pressing Prime A Oil is a hard, firm cake of a cream or ivory color, but with the McNeal-Edwards lot the result was a very soft, salvy mass, which is not as useful as a hard cake for the manufacture of stearin. We finally got merchantable stearin, but did not get merchantable fish oil.

"Q. 4. Even the amount that you got was not a large amount of Prime A Oil?

A. It was not."

The McNeal-Edwards oil was weak oil. In summer temperature it would be liquid. If allowed to stand in the tank over night it would be cloudy, producing a semi-solid mass. That is, this oil solidified at a comparatively high temperature. Average cost of putting Prime A Oil through the process would be a fraction less than two cents a gallon, and of putting this McNeal-Edwards oil through was five or six times that at least.

On cross-examination, the witness testified that he is now employed by The Jackson Door and Window Company, of Everett, and had been employed there prior to his employment by Frank L. Young Company; that he did not know of any Frank L. Young Company now doing business in Boston. He knew of a Mr. Thompson coming to Frank L.

Young Company's factory in February, 1922. He was with him (Thompson) part of the time, he could not say exactly [fol. 25] how long, a few minutes now and then. He gave him (Thompson) one of his men to remove the bungs from the drums, and helped him to draw a sample.

"X Q. 5. As I understand your testimony, the complaint of Frank L. Young Company was that there was excessive stearin in this oil?

A. Yes, sir; part of it."

I think we did bring something else into it. I think I did mention some fish-heads and large lumps, and one whole fish. There were 1,107 barrels in all. I found one whole fish twelve or fourteen inches long. It looked like a Menhaden to me, and was in one of the containers. Then there were some fish-heads and some meal, and some lumps. I did not count the fish-heads and could not give any idea as to the number, or the number of lumps. It is common to find in Menhaden oil some evidences of the remains of fish in good crude oil.

"X Q. 6. In any event you would say, out of 1,107 barrels of oil, the amount was very small, would you not?

A. Why, of fish, yes."

Beside this there was a lot of mealy white substance, which I should suppose was fish meal, a residue from the boiling process in which the oil is separated from the tissues of the fish.

"X Q. 7. Is that an assumption on your part, or did you make a chemical test?

A. We did not make any chamical test, no, sir, and I cannot give you any idea of the amount.

X Q. 8. Can you give us any idea what the aggregate quantity in the 1,107 barrels would be?

A. Why it would be inaccurate, if I did it.

X Q. 9. Then you can't give us any accurate idea without a chemical examination?

A. No accurate idea without a chemical examination.

X Q. 10. And you made no chemical examination?

A. I did not."

All Crude Menhaden Oil has stearin in it necessarily. It would not be Crude Menhaden Oil unless it had.

"X Q. 11. When you gave a description of the individual [fol. 26] experiments you did not state the temperature?

A. I don't recall I did mention the temperature.

X Q. 12. That is extremely important, is it not?

A. Why, yes.

X Q. 13. Did you find anything in either of these barrels, representing what is known as tank-bottoms?

A. Why, yes.

X Q. 14. Tank-bottoms are not stearin?

A. They are not.

X Q. 15. And they are not foots?

A. They are a mixture.

X Q. 16. What is the difference between tank-bottoms and foots?

A. Tank-bottoms would be a mixture of meal and residue with some foots included.

X Q. 17. Which, in your experience, would be the most serious charge to make against the oil—stearin or tank-bottoms?

A. The most serious would be stearin.

There is always stearin in any Crude Menhaden Oil.

X Q. 18. Is it true that for some purposes oil with a considerable quantity of stearin in it is just as good, or better, than oil without, or with a small quantity?

A. No purposes I could imagine.

X Q. 19. Do you consider 15 per cent excessive?

A. Fifteen percent is the maximum allowable for A Grade Fish Oil.

Redirect examination.

By Mr. Leach:

Drums were kept in the yard for three or four weeks in the sun before they were poured, in July and August, and when they were poured they still showed this salvy mealy substance.

Crude oil produces tank-bottoms. It is the residue in the settling tanks, and there are also tank-bottoms which would be in storage-tanks of crude oil. When tank-bottoms are spoken of it might be one or the other.

I had some talk with Mr. Thompson when he was at the plant.

ALBERT SEAR.

Testified on direct examination:

I am employed by Cook, Swan & Young, successors of Frank L. Young Company, and was employed by Frank

L. Young Company through the entire year of 1922. Had been employed by that company 35 or 37 years, mostly in straining and pressing fish oil. I didn't see any of the McNeal-Edwards lot of oil in 1922 when it was being [fol. 27] dumped. Know it was heated and put up in the chilling-room. I first saw the oil in July or August in the chilling-room.

"Q. Could you chill it as much as the other oil?
A. Well, it seemed to be about the same."

I had to do with the putting of the oil in the strainers. When I put Prime A Menhaden Oil in the strainers I filled them to the top, and would find one-quarter of it in the strainers in the morning,—from one-half to a barrel. As to the McNeal-Edwards lot of oil, there would not be much drawn out of it. Perhaps it would settle down one-half to a barrel in the strainer. There was no grain in this oil. By grain, I mean a sort of separation. It separates in the tank while it is chilling. The foots settle to the bottom, and appear in small particles. It is sometimes like wheat, little lumps that separate from the clear oil in Prime A Oil. The separation did not take place in the McNeal-Edwards oil. When the bags were put in the bays for pressing it did not move or run through free like other oil. When I increased the pressure on the bays more than usual, they would slide from one place to another. The moisture and slime that was there would ooze out of the bags. The contents were slimy. It was not oil. Oil wasn't free enough, or separated enough to ooze through the pores of the bag. There was moisture in it. The bays are piled six and a half feet, or seven, high. When they are all pressed they would be about two and a half feet from the floor with Prime A. The McNeal-Edwards lot was about two and a half feet down from the top. It took longer to press it. After getting through the pressing process with Prime A Oil there might be from one-half to one barrel of good, nice hard stearin, or hard cakes in the bags. Could not remove the foots of the two presses after the second pressing with this oil. We didn't get hard cakes from the pressing of the bags of McNeal-Edwards oil. It was soft and mushy.

WILLIAM B. SCHUTT.

By Mr. Leach:

Have been engaged in pressing fish oil 35 to 36 years. I remember the McNeal-Edwards oil. I had to do with dumping that oil. I think that Mr. Lee's description is just right. It was dumped in warm weather, in the sumer of 1922. It was a dirty matter to get it out of the barrels, some of [fol. 28] it, most of it. The barrel is poured with the bung down, and you would have to tip it a little and stick a rod in and stir it. It took a long while to dump those barrels, I don't remember just how long, longer than the ordinary barrel. It would take half an hour for one drum. I saw this oil filled into the strainers, and after it had stayed there all night went down about two inches probably from the top. I filled the mass from the strainers into the press bags. I set the bags up in the bay, and they would not stay there, they were sliding sideways when the pressure was applied. Acted to me like water and slime. When we got through the pressing process there was a dirty matter in the bags. It wasn't a solid cake, it was mushy. There were a lot of scales in the drums when we dumped them, some fish and particles of fish, and kind of yellow matter that come out of it.

Cross-examination.

By Mr. French:

I did not undertake to separate the dirty water from the clean, or measure the solid substance, the particles of fish that I saw. I was too busy to pay much attention to them.

"X Q. 1. To a greater or lesser extent, those things are found in all Menhaden oil, are they not.

A. Well, we have had Menhaden oil that you could put in at night, and it would just be coated around the burlap.

X Q. 2. In other words, as with all other things, there is a difference in Menhaden oil. Some is better than others?

A. Well, I guess there is. * * * I made no effort to measure the amount of any of the alleged impurities.

X Q. 3. It is not very clean stuff, anyway, is it?

A. Well, some of it isn't bad. That was. I have never seen any Menhaden oil that looked like this oil before or since."

PERCY L. YOUNG.

By Mr. Leach:

I was treasurer and a director of Frank L. Young Company in 1922. We were, at that time, in the business of pressing and refining fish oil, since 1908. I saw McNeal-Edwards lot of oil that came in in January, or February, 1922, in the drums, and I saw a sample that was sent over from South Boston to the office. The sample was extremely [fol. 29] thick, practically no free oil. The percentage of foots at a temperature of 50 to 60 degrees in Prime A Crude Oil would average 6 to 8 per cent. In this oil it was over 80 per cent. The oil in the McNeal-Edwards lots was not Prime A Crude Menhaden Oil. It was a scratch lot of oil that might be called stuffed oil. The market value on Menhaden oil in Baltimore, in 1922, was around thirty-two or thirty-three cents a gallon F. O. B. In my opinion the market value of the oil received from McNeal-Edwards from Baltimore in 1922 was somewhere around seventeen to eighteen cents a gallon F. O. B. I had nothing to do with the processing of this oil, and I never saw it in process. The almost invariable custom of buying fish oil is through a broker, and the dealings prior to the sale are with the broker. It is customary for the buyer to make complaint to the broker, and to receive answers to the complaints made from him. We made complaints to Reilly-Edwards, the broker in this case.

Cross-examination.

By Mr. French:

Was treasurer of Frank L. Young Company at time of this transaction. The company is now in dissolution. Certain assets of Frank L. Young Company were taken over by Cook, Swan & Young combination. This suit was not taken over. Have known the house of McNeal-Edwards Company for a great many years. I am sure that we bought considerable oil that came from that plant before, though I have no recollection of any specific transaction prior to this one.

Shown a letter signed by C. J. Murphy, president of the company.

Mr. French (reading):

"We certainly feel that as an honorable concern you do not feel like taking any advantage over one of your customers who has been dealing in your oil for years. Such being the case we feel you owe it to us to send one of your concern, or one of your representatives, to visit us and see for yourself that conditions are absolutely as we state."

I notice that the letter is dated June 10, 1922. I remember that Mr. Thompson (meaning Mr. George A. Thomp-
[fol. 30] son) had been sent here some time in February. I knew who he was, but think that was the first time I ever met him. After I made the first complaint to Reilly-Edwards Company with reference to this order, Mr. Thompson did come here. In the presence of some one representing Frank L. Young Company he took samples of the oil. He came up after our request that somebody should be sent. All we wanted was an impartial showing of what that stuff really was. Do not remember of any three tests being taken. There was a test made, at the time the draft was made on us, for free fatty acid. Have known the firm of Gascoyne & Co. for some time. They had never done business for us directly that I know anything about. I know that Mr. Thompson has drawn a great many samples of oil that we had bought, and that Mr. Gascoyne had made analyses of them. I am not a chemist. We paid for the oil according to the contract. "Check against documents." The documents were delivered to us prior to the time we paid for the goods. I do not remember that I asked any favor regarding payment. I have no distinct recollection of asking for any relief from this provision of the contract.

First made complaint to the broker immediately after arrival of the oil at our plant. I think the next day. Oil arrived some time in latter part of January. We sampled it after it arrived at the plant. We never made a complaint until we saw what we were complaining about. Complaint was made to Reilly-Edwards Company shortly after the goods arrived at the plant. Do not know exactly when that was, but my recollection is some time the latter part of January 1922. I believe the first complaint is in the correspondence; am not sure that we made any complaint except by correspondence; not sure whether we telephoned or not. We probably did. I am not sure, but I probably did

make complaint over the telephone to Reilly-Edwards. I have no distinct recollection about it. We complained at various times during the controversy we had with them. It was strung out over a period of months, I believe. I went to Baltimore to make complaint; nothing very distinct, but I believe I did; complained that the goods were not what we bought, that it was not a good delivery.

[fol. 31] "X Q. 1. Is that all?

A. Well, that pretty well covers the case.

X Q. 2. I asked you if that was all. I want your recollection, if you have any, of the conversation that you had with anybody representing Reilly-Edwards, in Baltimore.

A. I have no distinct recollection of any conversation with anybody, or of going to Baltimore at the time you refer to. I think that I did go there, and if I did go there, I think I probably described the oil at that time.

X Q. 3. Then all you vaguely remember is that you stated to somebody in Baltimore, to Reilly-Edwards, that the oil wasn't up to contract?

A. Well, I don't remember stating that much to anybody in Baltimore.

X Q. 4. Didn't you so testify a few moments ago?

A. I said I believed I went to Baltimore some time ago, not very long after that oil arrived here, on that matter. I haven't any distinct recollection of any particulars about any conversation with anybody there at that time.

X Q. 5. In the first place, you don't distinctly remember any conversation at all?

A. No, I have no distinct recollection of having gone to Baltimore and made complaint.

X Q. 6. Of course if you do not remember whether you went or not, you don't remember what you said?

A. That's it."

Well, any oral complaint that I would have made would have been on the basis of the actual appearance of the oil when it arrived.

"X Q. 7. What did you complain of, in your own mind—we will put it that way—with respect to the oil?

A. The complaint of that oil primarily after it arrived there was that it was not Prime A Crude Oil inasmuch as it was about 80 some odd percent solid matter. That is, as far as we could determine the quality of the oil at that time.

Later, when we had occasion to try to run it through the process, we discovered other objections. After we had actually dumped the entire lot, we found it very difficult to work. It didn't act like any other lot we had in the plant. But we didn't know that at the time of the original com-[fol. 32] plaint, shortly after the arrival of the stuff, because we didn't have occasion to dump it or work it through our presses.

X Q. 8. Is there anything else that you had in your mind at that time in the way of complaint against this oil?

A. I believe the question arose of some discrepancy between the free fatty acid test as reached by Mr. Gascoyne and as reached by us after I believe there was some difference in the free fatty acid.

X. Q. 9. The free fatty acid matter was adjusted finally, wasn't it?

A. Yes.

X Q. 10. So that's out of the question now. You didn't make any explicit statement of the fault that you found with that oil, either to McNeal-Edwards, or to Reilly, Edwards, within a short time after you received it?

A. Well, I probably did, but I can't remember distinctly just what I did say either to them or anybody else. It is mainly in the correspondence, I think. I believe I made a complaint that there were tank-bottoms in the oil, but I am not sure.

X Q. 11. Do you remember whether or not that was at any time your principal fault?

A. I wouldn't say that it was the principal fault. I would say that it was part of the sum total, an important part of the sum total.

X. Q. 12. Why didn't you send the oil back, if you found it as bad as that?

A. We agreed to pay for it; we had to pay for it.

X. Q. 13. In other words, if your recollection is correct, you paid for the oil after knowing, or, as you say, believing, it was not in accordance with the contract?

A. We paid for it under protest when we did pay for it.

X Q. 14. Was that in writing?

A. Yes.

X Q. 15. Did you ever complain to Edwards, or Reilly, Edwards, that this oil was fully 40 percent tank-bottoms?

A. I believe I did; yes.

X Q. 16. Let's see if this refreshes your recollection. Do you remember going into the office of Reilly, Edwards in Baltimore any time early in February and complaining that this oil was bad because it contained 40 percent tank-bottoms?

[fol. 33] A. I haven't any distinct recollection of going to Baltimore at all, but I am pretty reasonably certain I did go down there at that time.

X Q. 17. Did you at any time make that claim to Reilly, Edwards that the oil was bad because of tank-bottoms?

A. Yes, I believe I did I have no recollection of making any complaint to them in Baltimore at that time, because I don't remember having been in Baltimore at that time."

The drums are piled up in the back yard of Frank L. Young & Company.

[Mr. French reads letter addressed to Frank L. Young Company from Reilly, Edwards Company, dated February 13, 1922. Admitted in evidence and marked "Exhibit A".]

EXHIBIT "A"

"In regard to the 1107 barrels of McNeal Edwards Company's oil, we beg to advise that we laid before the McNeal Edwards Company in a letter all of the statements made by you to us in regard to the quality *fo* [sic] shipment.

We are today in receipt of a letter from the McNeal Edwards Company, under date of February tenth, stating that your claim that the shipment of oil was 40% Tank bottoms, is absurd, that the oil was 'A Grade Oil' and that they consider that they made you a good delivery under your purchase and that they now demand immediate settlement of the balance due them as per contract.

We hope to have this settlement from you by return mail."

[Mr. Leach reads letter from Frank L. Young & Company to McNeal-Edwards Company, dated June 10, 1922; admitted in evidence and marked "Exhibit 7".]

EXHIBIT 7

"Inasmuch as we have been requested several times by Messrs. Reilly-Edwards Co. to return the 1107 drums

(which you shipped us) when emptied, we feel that we should let you know just how the matter stands.

The facts of the case are that the oil contained in the drums is so thick that it is almost impossible to empty them. We naturally felt that with the advent of warm weather the oil would become perfectly limpid and empty out readily, [fol. 34] because we have never had any oil before but would thin out in warm weather and become in a measure workable. We certainly feel that you would not have intentionally shipped us any oil such as you did.

We presume that the oil was not when you filled it into the drums, and therefore you did not realize how thick the oil actually was when not in a heated state.

We protested most vigorously to the Reilly-Edwards Co. at the time the goods were received by us, our claim being that to an absolute certainty the goods delivered were not a good delivery on our purchase, and we have no doubt but what our protest and claim was duly presented to you by them at the time. Mr. Edwards of Reilly-Edwards Co. was in Boston a few days ago, and at our request he visited our factory and looked over the goods and watched our men trying to empty a few drums.

He can most sincerely vouch for the facts as stated by us above.

We certainly feel that as an honorable concern you do not feel like taking any advantage over one of your customers who has been dealing in your oil for years, and such being the case, we feel that you owe it to us to send one of your concern or one of your representatives to visit us and see for yourself that conditions are absolutely as we state.

There has been some serious mistake made in shipping such goods to us, and naturally you should be vitally interested to have the mistake rectified and not have your reputation suffer. We are averse to making any trouble in this matter, and will not do so until after it would develop that you are not willing to meet us in a fair and square manner and investigate conditions as they can be shown here.

Kindly advise us by return mail when it will be possible for you to send your representative here to look into the matter, and oblige."

A letter from McNeal-Edwards Company to Frank L. [fol. 35] Young Company, dated June 20, 1922, was admitted in evidence and marked "Plaintiff's Exhibit 8".

EXHIBIT 8

"We received your letter and contents carefully noticed, first will say that we sold you the tank of oil and not the oil off the top of the tank. We also sold it to you on a 5% basis and a deduction of one half cent per gallon of each one per cent of F. F. A. over five, which you did not live up to.

The oil that we shipped you was good limpit oil with the exception of about 75 barrels which was close to the bottom of the tank but this was A prime oil which we can prove by Mr. Thompson, if the oil had contained 40% tank bottoms as you contested it would have gone higher in F. F. A., you will notice that the sample that Mr. Thompson drew at your place was about the same as the sample he drew when he weighed it.

We feel that we delivered you a very very good grade of oil which Mr. Thompson will testify too, so their is no need of us sending a representative to your place to see the oil, we will expect you to ship the drums as soon as possible. We are, Yours truly."

Tank-bottoms have nothing to do with free fatty acid. Total freight on the oil from Baltimore to Boston was $1,707.78. Cartage charges after reaching Boston amounted to $328.

JOHN L. ROUNSEVELL:

By Mr. Leach:

Employed by Frank L. Young Company in the summer of 1922, after July 15th as assistant to the superintendent, Mr. Lee. I saw, I think, about thirty-five or forty drums of McNeal-Edwards oil dumped. I went away about the middle of August. I noticed the oil was very thick for oil to be at that time of the year, and it contained more or less waste matter and a lot of water and substance in the oil. I saw it going through the heating-tanks and from there to the chilling-room and into the strainers. It was so thick and slimy

that the separation that should take place under normal conditions did not take place in the strainer. The same thing applied to the pressing process. Where there should be a great quantity of oil come out, there was practically none.

[fol. 36] "Q. 1. Did you know what Prime Grade A Menhaden Oil was?

A. Yes.

Q. 2. Was that what that was?

A. Not to my knowledge."

Cross-examination.

Mr. French:

I first saw the oil in the yard in the drums. Personally I had nothing to do with the operation except as supervisor. Supervised part of it. First thing I did was to dump it. I saw only thirty-five or forty of the drums dumped. Made no particular observation, except in a general way, that the quality was poor. There were 1,107 barrels [drums] in all. There is oil known as A Crude Menhaden Oil, or Prime A Crude. They are must the same thing.

"X Q. 3. 'Merchantable Prime A' and 'A Crude' and 'Merchantable', all mean the same thing?

A. No. Merchantable would not, because it might be merchantable oil of some other grade."

It might be B grade, or gurry. A and Prime A are practically the same thing. I will not say that it was impossible for oils to be confused in the factory, but it is not probable. I was not there when Mr. Thompson came up to do the sampling, and was not present at any sampling of this particular oil.

CORNELIUS J. MURPHY:

By Mr. Leach:

In 1922 I was president of Frank L. Young Company, and am now connected with the successor to that company. Have been in the business of purchasing and processing fish oil for forty-six years, and for at least thirty-six years I

have been more or less interested in the buying and selling of fish oil. I recall the purchase of 1,107 drums McNeal-Edwards oil in 1922. Did not see the samples of oil before we bought, but did see them after the goods had arrived here. I saw the sample which had been taken at our plant. I saw the samples labelled "McNeal-Edwards Oil", representing 1,107 drums fish oil from Reilly, Edwards. My observation is that sample was very thick, full of foots and could be described almost as tank-bottoms from a storage tank. My impression is that it was about 80 percent foots. We contracted for Prime A Crude Menhaden Oil, but the oil we received was not Prime A Crude Menhaden. It was [fol. 37] too heavy in foots to be able to be passed as A Oil. I should say it was worth at that time about seventeen cents a gallon. Value at that time of Prime A Crude Menhaden Oil in Baltimore was about thirty-three cents a gallon. Sent telegram to Reilly, Edwards as follows:

"February 3, 1922. Reilly, Edwards Co., Baltimore, Md. We find the 1107 drum lot also very thick and 7.33 acid, which is not a good delivery. Frank L. Young Company."

On February 27, 1922, we telegraphed as follows:

"Reilly, Edwards & Company, Maryland Trust Bldg., Baltimore, Md. We hereby demand immediate fulfillment of various written contracts according to which 1107 drums McNeal, Edwards oil received did not constitute good delivery and pending reasonable settlement stands rejected. Frank L. Young Company."

In the purchase of fish oil, it is more customary than not to work through brokers. All transactions are made with them. Broker in a case like this is the party who invoices the goods, and who collects the money. We look to our broker for adjustment. That is the custom.

Plaintiff's Exhibit 9, letter F. L. Young Company to Reilly, Edwards Co., dated March 4, 1922:

EXHIBIT 9

"Acknowledging receipt of your letters of the 3rd instant and pursuant to telephone conversation with your Mr.

Edwards today, we repeat that we are extremely desirous of settling various matters at issue and as tangible evidence of this desire to meet you at least half way and with the understanding that your Mr. Edwards will come up to Boston at his very earliest possible convenience to iron out the remaining question, we enclose herewith our check in full settlement of the balance due on the McNeal-Edwards transaction.

We feel that we are accepting a very material loss on excess Foots beyond what we had a right to expect, and must have it thoroughly understood that our action in this mat- [fol. 38] ter does not prejudice our rights in any of the other points still pending."

We had no previous contracts direct with McNeal-Edwards, but had had a good many through a broker covering perhaps ten or fifteen years, at intervals. I know George A. Thompson. Met him on his visit to Boston at our office after he got through testing the oil. Had worked for us through a broker or through sellers. It was a part of their duty to perform, to furnish the gauger and have it gauged. I never met Mr. Gascoyne until today, but I think we had employed him once or twice about 1925. I personally took no part in the processing of this oil, and examined only the bottle said to contain the sample. Mr. Thompson left a bottle with me. I do not know where it is. It is lost. I know we cannot find it, for we hunted everywhere for it. It was lost for a couple of years. We began to hunt for it when the case was coming up two years ago. We went looking for that bottle. I have not got, and cannot produce, the sample left by Mr. Thompson, and I appreciate that might be very important to the defense of this suit. I have no sample that Mr. Lee [plaintiff's superintendent] drew. He was our chemist.

Redirect.

Mr. Leach:

I observed the sample Mr. Thompson took.

"Q. 1. Did it coincide with the sample Mr. Lee took?

Mr. French: I object.

The Court: Did he observe any difference in the two samples, between Thompson's and Lee's? You can have that, Mr. Leach. I will admit it.

Mr. French: Save my exception.

The Court: Yes.

Witness: I could not see any difference in the two samples. Both samples appeared the same to me."

Samples kept in the back part of our office, in same room with safe. There is no particular place to keep them. They are in cans but the bottled samples were kept right in the office itself. There are quite a few of them on top of my desk, and on the adjoining desk, and quite a few on the [fol. 39] mantle in the front office. Probably 40 four-ounce bottles on top of my desk today. There are seven people in the office. No persons are forbidden to handle samples. Mr. Cotter requested us to look for them. Written contract signed by McNeal-Edwards never was received by us.

Recross-examination.

Mr. French:

I realized the very great importance to the principal issue in this case of the samples which we received from Mr. Thompson.

"X Q. 2. You realized, did you not, that if that sample were in existence it might have settled the case in our favor?

A. I cannot say as to that.

Q. 3. It was a sample taken by Mr. Thompson in your storehouse and left with you by him as representing the result of his sampling?

A. Yes.

X Q. 4. Do you mean there was no system whatever observed with reference to the care of these samples?

A. Why, there was more care taken of these samples than the ordinary. We have no real system. My attention was not directed to it after it was left with me until Mr. Cotter asked me about it two years ago.

X Q. 5. So that from the time of the beginning of this suit, four or five years ago, whenever it was, you had not given the matter any thought?

A. No, but we always felt the samples were there. We gave it thought. It would have been a perfectly easy matter for us to have properly labelled that sample and put

it in a place that was safe for use at this trial. The sample made by Mr. Lee was lost at the same time."

We eventually worked the oil received from McNeal-Edwards Company with other oil, so as to make it saleable, and worked it off and sold it. The oil disappeared entirely from our factory about the end of 1922, that is within a year after the delivery.

CEDRIC F. LEE, recalled:

I took samples of McNeal-Edwards oil after it came in, and put it in a bottle labelled "Sample of 1107 Drums Oil, Reilly, Edwards, Received"—and the date. It was sent to the office.

Cross-examination.

By Mr. French:

Saw it after that at the office, within a week or two of the time I sent it over, on Mr. Murphy's desk, labelled. I [fol. 40] did not open it. I picked it up, examined it, and put it down again on Mr. Murphy's desk. Think I saw it again on his desk, subsequently. Where he would have it under his eye, at his desk, all the time. Last saw it about two weeks after I sent it over. Never asked to see it after that, that I can remember. I realized samples are important in any trial of this nature.

The bung holes in the drums were some two inches, some two and one-half, and some three inches in diameter. I have testified that oil was leaking from these drums in February, and that when I saw them in August it would not flow freely, that is, without the aid of stirring or agitation. It did flow in due course of time, and if you stirred and agitated it then the oil would flow.

Redirect examination.

Mr. Leach:

There was a very small amount of oil oozing through cracks in these drums.

GEORGE H. MCNEAL:

Direct examination.

Mr. Leach:

I am connected with McNeal-Edwards Company and was in 1922. Had then been in fish business twenty-seven years. Have heard of Frank L. Young Company. Did not know what their business was, only oil buyers. Didn't know their business was pressing fish oil. Knew they had a plant in Boston. Crude Menhaden Oil besides being used in pressing is used a good bit in soap. Cannot recall how long we had been dealing with Frank L. Young Company, possibly had sold them several lots of oil—couldn't say without records. 1,107 drums were shipped to Frank L. Young Company about January 16th, under contract made through Reilly, Edwards Company for delivery of Prime A Crude Menhaden Oil. McNeal-Edwards Company have been in business of manufacturing and selling Crude Menhaden Oil in Prime A variety since 1901.

Cross-examination.

Mr. French:

I was not told by anybody to what use Frank L. Young Company were going to put this particular oil. I did not know whether they bought it for reselling, pressing or for any other purpose. We had no direct dealings with any of the Frank L. Young Company people, only through brokers.

[Plaintiff's evidence closed.]

[fol. 41] GEORGE A. THOMPSON:

Direct examination.

Mr. French:

Live in Baltimore, Maryland; sixty years old; have been sampling fish oil for thirty-five years and in gauging busines for twenty years. Give my whole time to this work. Am sworn official of State of Maryland. Knew McNeal-Edwards Company and Frank L. Young Company. Some

time in January, 1922, made a sample of certain oil at McNeal-Edwards factory that was to be shipped to Young Company.

"Q. 1. And will you state how you made the sample and what the result was?

A. I have a sampler which extends through the bung hole to the bottom of the drums. The slide closes going down and it gets a percentage of oil from the bottom of the barrel and the top of the bung or the beginning of the bung, every portion, and it is divided up into sections to keep it from running down. When I withdraw that I open my slide and put it in a pail until I am through the whole oil.

Q. 2. So that you have a sample of every inch from the top to the bottom?

A. Every inch from the top to the bottom. I took an average sample from every fifth barrel of the 1,107. I took two samples from McNeal-Edwards on the sixteenth day of January. One I turned over to Dr. Gascoyne and the other to Reilly, Edwards.

Q. 3. I hand you a bottle and ask you if you know what it is?

A. Yes, sir. That is a sample I drew at McNeal-Edwards' plant at Reedsville, Virginia, on the 16th of January, in the manner which I have described."

[Bottle marked "Defendant's Exhibit A", and a small can is marked "Defendant's Exhibit B".]

Bottle was filled right here in the court room this morning from this can and the can is the one I delivered to Mr. Gascoyne.

"Q. 4. Now, what kind of oil is that?

A. Prime A Crude Menhaden Oil, a product which I have known for the last thirty odd years."

The broker pays the gauger. There is no difference in the trade between Prime A Menhaden Crude Oil and A Menhaden Crude Oil. Not in the handling.

Made later sample of oil in drums at Frank L. Young [fol. 42] Company's factory, the 20th of February, 1922; at the request of Reilly, Edwards Company I sampled it there at the South Boston plant. The senior Mr. Young sent me to the plant. I described to him how I drew the sample at the plant at Reedsville. He did not go with

me to the South Boston plant. I sampled all I could get at, I should judge about one thousand barrels. The reason I did not sample the others was that we could not get at them. There was a man with me from the plant all the time.

[Witness shown bottle, and said that it contained the sample procured on the occasion as to which he was testifying.]

I took these samples in the same way that I took those at the factory at Virginia, with the same instrument. From every package that we could get at. I carried one to Frank L. Young Company and the other two to Reilly, Edwards Company, and we took them to Gascoyne.

"Q. 5. Now, when was this placed in that bottle?

A. This morning, right here in the court room, from the container with my own tag on it.

Q. 6. As I understand it, this bottle which I have in my hand, and which is not marked, came from the tin which I held in my hand this morning, in the court room?

A. Yes, sir."

[Bottle admitted in evidence and marked "Defendant's Exhibit C".]

"Q. 7. Now, from your long experience is that sample Crude Menhaden Oil?

A. Yes, sir.

Q. 8. Prime A Crude Menhaden Oil?

A. Yes, sir.

Q. 9. Are there any tank-bottoms in either of those samples?

A. No, sir.

Q. 10. And that is just as they came from the barrel?

A. Yes, sir. Samples were taken on the 15th of January, 1922.

Q. 11. It is not your province to examine oil for stearin or any of its chemical component parts?

A. Only to see that it is free of water and tank-bottoms.

Q. 12. I call your attention to that bottle, and ask you if you know what it is?

A. Yes, sir. That is what we call tank-bottoms.

[fol. 43] Q. 13. Have you any knowledge of where they came from?

A. No, sir.

[Bottle admitted in evidence and marked "Defendant's Exhibit D".]

Stearin is found in all Menhaden fish oil. So far as trade designations go, there is no difference between A Prime Crude Menhaden Oil and A Menhaden Oil in my work. There may be a difference between the barrels but I don't know. Prime A and A are all the same in grading it.

[Witness shown bottle marked "Exhibit 5".]

Q. 14. I ask you what that looks like?

—. That is Crude Menhaden Oil.

Q. 15. I call your attention to Exhibit 6 for identification, and ask if that is Prime A or Crude A Menhaden Fish Oil?

A. That is pressed oil.

In my opinion and experience the samples which I have introduced here, and which have been offered in evidence, fairly indicate the quality of the contents of the drums which I examined.

"Q. 16. Is there any way in which it could have been tested more accurately?

A. Not by a sampler.

Q. 17. Then when you say that, you mean to suggest that the chemist is the best to examine it?

A. I should judge so; I couldn't say."

I never saw any Crude Menhaden Oil that would not congeal at freezing point. It will conceal at much less than freezing point. When I took the sample to Mr. Young at the office of Frank L. Young Company, I took three bottles down and said: "One for you, either one you wish to take." They were in pint jars. He picked one out and kept it, and I took away the other two which I subsequently delivered to Reilly, Edwards, and from there they were carried to Mr. Gascoyne's office. I went with them.

"Q. 18. In transferring the oil from the can to the bottle, this morning, what, if anything, did you do to the can just before pouring it into the bottle?

A. Shook it up thoroughly."

I am in no way connected with or interested in the McNeal-Edwards Company, or the Reilly, Edwards Company. [fol. 44] Reilly, Edwards & Company, the brokers, paid the expenses of my coming to Boston to take samples here.

Cross-examination.

Mr. Cotter:

Had no agreement or understanding with Captain McNeal regarding the expense or cost of my trip here. Had known McNeal-Edwards Company prior to 1921 for twenty years at least, ever since I have been in the gauging business. Made a great many samples of oil for them. They have not paid me a great deal of money; I get it from the broker. Remember meeting Harold Young in Baltimore two years ago. Following my sampling of January 16, I made a report to Reilly, Edwards, and Reilly, Edwards reported to McNeil-Edwards that there were seventy-five barrels which were weak oil, not Crude A. Did not tell Mr. Young that there were seventy-five barrels in that lot that "never should have been sold for oil". I reported that, before it was shipped, to Reilly, Edwards to report to Frank L. Young Company when they bought the contents of the tank. They knew they were going to get some heavy oil in it. Reilly, Edwards said they reported to Frank L. Young Company. All the oil which they (McNeal-Edwards) had was in that tank [meaning the storage tank already referred to]. This lot of oil was all that McNeal-Edwards had. Do not know whether it was the last in the tank or not. I knew when I came to Boston that there was serious controversy over the character of this oil, or I would not have gone up there. In this case the samples I first took were in pint glass jars. They were not sealed. I had them in my possession until I delivered them to Reilly, Edwards and to Mr. Gascoyne. I left one of them with the Young Company. I did not leave them with Reilly, Edwards unsealed. They were left with Mr. Gascoyne by him. They were not sealed. They were put into these metal cans in my presence. The cans were not sealed in my presence. Did not know that this was a court case at that time; knew there was trouble. Since it was left by me in Gascoyne's office in the condition which I have described, six or seven years ago, I have not seen it until today or yesterday. The reason for distinguishing them by numbers 1 and 2 was that I had drawn one at Reedsville and one at Boston. The small bottle, No. 1, is from [fol. 45] Reedsville, No. 2 from Boston. They are both Grade A Oil, and both are the same as far as my observa-

tions are concerned. I drew them out of the same package. In my opinion these two bottles look identical. I do not know whether acid ever accumulates in this Grade A Oil by reason of any lapse of time. Haven't been to Captain McNeal's plant, nor had any conversation with him by letter, nor seen him at all, until the night we came up here for this trial. I never had any talk with Captain McNeal, prior to this shipment, when I was sampling their oil, with reference to Frank L. Young Company. I examined one out of five of 1,107 drums of oil, or 220 drums examined, and on that test I reported to Reilly, Edwards that there were seventy-five barrels of heavy oil. There is no difference between heavy oil and weak oil, I should say.

[Witness was shown the sample which he testified had been taken in Boston.]

"X Q. 19. Let me ask you this, whether this Exhibit No. 2——

A. That's the Boston.

X Q. 20. Didn't you state a moment ago in answer to Mr. French that they looked like Grade A Menhaden Oil?

A. I said it was Grade A Menhaden Oil.

X Q. 21. That's what you say now?

A. Yes, sir.

X Q. 22. And you say that is? [Indicating sample testified by witness to have been taken in Reedsville, Va.]

A. Yes, sir; that's been all riled up, shook up. It will settle away down to here [indicating a point about one-fifth of the distance from the bottom to the top of the bottle].

X Q. 23. How long will it take to settle?

A. In a certain temperature, five to ten hours. If you have it in a certain temperature you will find it that way tomorrow."

[This testimony was given on Wednesday morning, February 8th, about 11 A. M. The case went to the jury on Friday morning, February 10th, at 11 A. M. The samples referred to were kept in the custody of the clerk, and during court hours were motionless on the clerk's desk. At no time between Wednesday at 11 A. M. and the time that [fol. 46] the case went to the jury did the defendant's samples give any indication of settling.]

"X Q. 24. Have you made any test of this oil in any other of these cans by putting it in a bottle and allowing it to remain five or six hours?
A. No."

Redirect.

Mr. French:

I personally handed the sample which I took on January 16th in the factory in Virginia to Mr. Gascoyne in the tin which I have described. The same is true of the test made on February 20th in Boston. They have been in my custody all the time. There would be no object or purpose in sealing it up before I gave it to Mr. Gascoyne unless I was requested to do so by the buyers. He, of course, would have to unseal it in order to make the chemical examination. In those samples, the proper proportions of thick and heavy oils was put into the cans so that it would reach a fair average. Of the barrels I examined in Boston, only those seventy or seventy-five looked thick to me. They were heavy, or weak as they call it. They were Crude Menhaden Oil in color, that is what the sample is, A or Prime A, that is the only way we term the color of oil, as A. I examined something like one thousand barrels in Boston. I could not say whether in the ordinary course of transaction of this kind I should expect to find that percentage of oil heavier than the rest. In the winter time I should always expect to find some of the oil heavier than the rest. I took samples from each of the thousand barrels, and the samples showed the average quality of the oil.

Q. 30. But you do not consider anything is a gauging test but color and sweetness?
A. And free water and tank-bottoms.

The Court: An excess of stearin would not affect the grade of that Prime A or A in your mind?
The Witness: No, sir."

The tag which Mr. Cotter asked me about is in my handwriting. Marked "Sampled in Boston by G. A. Thompson, February 20, 1922". That remained on the bottle until I took it to this man [that is Mr. Gascoyne]. It belonged to this larger tin.

[Tag referred to is marked "C-1".]

[fol. 47] I found no tank-bottoms in this oil at either of my examinations. Nothing of that sort was found in either of my examinations. If it were it would show up instantly in the sample.

Recross-examination.

Mr. Cotter:

Exhibit 5 for identification is all right for color, Prime A. Exhibit D is all right for color, also.

Redirect examination.

Mr. French:

When I find tank-bottoms they are in containers, barrels or something else. Some look light and some dark. I should say there were no tank-bottoms in this lot [sold to Frank L. Young Company]. None of the samples in front of me contain any gurry oil. Gurry is a Menhaden oil with a heavy sour smell. Gurry oil is black, very dark. I should expect to find difference in color in A Crude Menhaden Oil; some is a little darker and some a little lighter, but it still remains Crude A Menhaden Oil in either case. I delivered to Mr. Gascoyne an average of all barrels which I examined. I did not find in any examination any oil that I would call bad, or that I could not pass as Menhaden Oil. I opened and drew a sample out of every fifth barrel or package of the 1,107 drums, or barrels, whatever you call them. They were in drums.

Recross-examination.

Mr. Cotter:

I do not understand how fish scales, bones, or fish heads could get in. I never saw anything of the sort. Have been handling oil for thirty-five years. If I did see them I would say it wasn't merchantable oil, and would not pass it. It is inferior goods, not cooked, not pressed. I would not be apt to get that from the bottom of the drums with the instrument I had. The refuse you have mentioned would not have been shown in my test, that is fish heads or a whole fish, sixteen inches long.

"X Q. 31. If you should find one fish in 1,100 barrels of oil, would you pass the oil?

A. I don't think I would. I never have found it in thirty years, and I don't know how it could get through the bunghole.

X Q. 32. How far would one fish affect the quality of 1,100 barrels of oil—assuming the fish were there?

A. I couldn't tell you."

[fol. 48] GEORGE H. MCNEAL:

Direct examination.

By Mr. French:

Our fish are caught all the way from Hatteras up to New York. The season is from the twentieth of June to the twenty-fifth of November. We fish for Menhaden, sometimes known as alewives, which is a food fish. They are caught in purse nets, and brought to our wharves at Reedsville. We unload the steamers, put elevators in and unload them. Then we cook them in a continuous cooker, with steam. They cook up pretty fine. Then they are lifted upstairs by the elevator and go through a continuing process. They are put under pretty hard pressure. The scraps fall below. The oil has to go through a process with screens with round holes and springs. What we press goes into screens and from there to the receiving tanks which lets through some of the fine matter and water and oil. It goes through one-quarter inch screen to the oil tanks. After the fish are cooked they are pressed and the oil goes down through the screen with water and some fine matter. The fine matter is mostly fish meal. The particles are small enough to go through one-quarter inch mesh, very small. It would not be possible for a whole fish to go through the screen. After the oil passes through the screen it goes down into the receiving tanks. It goes into receiving tanks first. It flows down to the receiving tanks from the pressers. That is all open. There is no chance for any fish to get in there during that part of the process. When it goes to the receiving tank we use a double tank. When we cook 300,000 we shift to the opposite side. It is in the same

trough, but we shift the gate. Then we start the flow in on this side and we pipe it up on that side and it goes into the cooking-box through three-inch pipe and is cooked thoroughly. Everything that passes through the screen goes through this three-inch pipe and from there to the cooking tank and is thoroughly cooked.

The description of the process which I have just given applies to all shipments, including this. After cooking, it is transferred to the settling-tank which is close to the cooking-tanks. We pipe it by gravity. From these tanks we pump it into the storage-tank and it is left there until we sell it. We use a steam pump of eight valves, and all the [fol. 49] oil goes through these valves on its way to the storage-tank. At the time this contract was made we were using only one storage-tank. The oil is drawn from the storage-tank into barrels, or into a tank-boat. There were no tank-bottoms in this shipment. The oil is usually heavier at the bottom of the tank. At the time we took this order, the contents of the tank were estimated at from 1,000 to 1,200 drums. We make only two kinds of fish oil: "A Crude Menhaden Oil" and what we call "gurry". The oil delivered was "A Grade Crude Oil". There is no difference between "Prime A" and "Grade A". We did not pump the tank dry, we left about six inches in it. The six inches looked like oil on the top with considerable stearin in it. We never barrel them any closer than six inches. There were no impurities in the oil. We made two shipments to fill this order. The first was on the date of the gauging,—I think the 17th—and the second, the following Wednesday,—one day between. There is a big lot of difference between gurry and "A Prime" oil in appearance. Gurry oil is very black, very high in acid. There was no gurry oil in this lot. I could not say what the temperature was the day we barreled this oil. This oil was heated up. We had to heat it up to barrel it. We heated it up to 80 or 90 degrees, something like summer heat, strong summer heat.

Cross-examination:

We have employed Mr. Thompson as a gauger for twenty-five or twenty-six years, and have at times employed Mr. Gascoyne as chemist. We have no particular brokers,

but we took orders from Reilly, Edwards at times. I never heard from anybody, at any time, that there were seventy-five barrels of bad oil, or weak oil, in this lot. I did hear somebody had said that there were seventy-five barrels of oil out of the 1,107 barrels that were weak oil. I don't remember who said so, and could not say when it was. At the time I got the message from Reilly, Edwards that Frank L. Young Company were asking that we send somebody to make a further test, we had had reported from Mr. Thompson, or from Reilly, Edwards, that there were seventy-five barrels of weak oil.

[fol. 50] I was the only manager of McNeal-Edwards Company in 1921, and had charge of the fishing boats. In 1922 we had four boats, and I superintended the overhauling of them. We had two factories at Reedsville, in 1922. I was a partner in both with my brother. As general manager I was the only one to supervise the production of oil in the McNeal-Edwards factories. We had no superintendent. We had an oil tender, whose name was Whaley. He was the one who had the actual supervision of putting this oil through the tanks, and he would know the condition of the tanks. Whaley is not here, and his deposition has not been taken. Whaley had charge of the tanks, knew the condition of them, and had charge of the other tanks that I have described. We have two settling tanks, one 18 by 20 and the other is 20, a round tank. From these tanks the oil goes to a storage-tank, of which we had two. One holds 1,200 and the other 3,000 [barrels]. The oil sent to Frank L. Young Company came from the 3,000-barrel tank. Whaley kept no records of when the storage tanks were cleaned. I attended to that part. We pumped them out, cleaned them up and washed them and skimmed them out. We cleaned them out about twice a summer. We would get some settling out of them, some solids, and they were put in a gurry tank. We never go below six inches in a storage tank. Some below that would be "Prime A Menhaden Oil". The oil is taken from the storage-tank from the top. If we get an order for less than a tank we would take it off the top. We did not keep any record of the bottoms. Nothing to show how much was in the settling-tank at the time it was drawn off to fill this order of Frank L. Young Company. When we go down and barrel with six inches the water will pull through sometimes in the pipe

and cause a great deal of trouble when it gets into the oil. When you get oil down six inches it is muddy. I cannot give you any idea of the business we did, number of barrels, etc., in 1921, without going over the records. From the settling-tank, there will be more or less settlings in the storage tank, and as each lot comes off the top of the storage-tank there is an increase of sediment accumulated from what is coming in. The amount of the sediment, as I have [fol. 51] stated, depends upon the amount of business that we did and the number of times that we cleaned out, or attempted to clean out, the storage-tanks,—sometimes once in a month and sometimes once in two months. I have no record of the number of barrels that were taken off that storage tank, during that period of 1921. The condition of the screen was left to Whaley. I did not go to Baltimore at the time the oil was shipped. When the drums were filled in our factory the temperature of the oil was from 80 to 90 degrees. We put live steam down the water through a steam pipe. Mr. Covington is connected with our concern as bookkeeper, and was when this shipment was made. He had more or less to do with the transaction, and answered all the correspondence that went on between the parties. Some letters he would write and would not call my attention to. He is still in our employ, and is not in court. I knew of no attempt to take his deposition.

Some time in the summer, possibly along July or August, we commenced to use the little tank. We cleaned it out entirely and it was quite a while before we put any more oil in into it. None was put in until the first of October.

[Witness shown Exhibit 8, which is read to the jury; see supra.]

"X Q. 1. Now with reference to that statement, 'We sold you a tank of oil and not oil on top of the tank', what does that mean?

A. Well, the oil on the top of the tank until it is heated is more limpid."

Mr. Whaley did not have anything to do with barreling it. Only running it in, and passing it up hill. I was present at the oil-tank when these various proceedings were gone through. Whatever Mr. Whaley did was under my

supervision on some occasions, but not all the time. He went on nights when I wasn't there.

Recross-examination.

By Mr. Cotter:

If any part of the system needed any repair Mr. Whaley called it to my attention, but no record was kept of the repairs. The amount of "foots" in Menhaden oil is not taken into consideration at all in determining whether it is "Prime A".

[fol. 52] X Q. 2. Well, does the amount of stearin in your opinion enter into the determination of what constitutes Prime A Menhaden Oil?

A. Well, I couldn't really say. Prime A usually goes along pretty low in acid.

X Q. 3. Well, in stearin,—would you say if a certain amount of stearin should appear in Prime A Menhaden Oil it makes no difference?

A. I wouldn't know what amount would be into it.

X Q. 4. So you leave it now that it wouldn't make any difference in your opinion whether there was 100 percent stearin,—that wouldn't affect your opinion whether it was Prime A Menhaden Oil or not?

A. I don't think it would be 100 percent.

X Q. 5. No. I say that you say it makes no difference?

A. I don't know as I say that it don't make no difference.

X Q. 6. Does it make any difference?

A. I don't suppose so, so much, but what that amount is I can't tell.

X Q. 7. You are still producing oil?

A. Yes, but I don't know the amount of stearin in the oil.

X Q. 8. You don't. You don't know the amount of foots that goes into Menhaden oil?

A. Very little foots goes into it.

X Q. 9. But can't you tell us the percentage?

A. No, I can't, honest.

X Q. 10. Over eight percent?

A. No, sir, not that much on foots, but as to stearin I don't know."

WILLIAM J. GASCOYNE, JR.:

By Mr. French:

I live in Baltimore, Maryland. I am a chemist, and have been for twenty years. I got my chemical education at Columbia University. Am connected with Gascoyne & Company. It was part of my business in January, 1922 and later, to analyze fish oil. I made a specialty of such analyses and had for a number of years. I am still engaged in that work. I know the concern of Reilly, Edwards Company, and have done work for them, and through them. My work was paid for by brokers. I made a specialty of the analysis of fish oil. I have analyzed what is known as "A Prime Crude Menhaden Oil" frequently. I should say two or three hundred shipments every fishing season, which lasts sometimes from summer until around Christmas [fol. 53] time. I am familiar with the product known as "Prime A Menhaden Fish Oil". "A Prime" and "A" to the trade mean practically the same thing. There are really no other distinctions in the way of trade names in fish oil other than "Crude Menhaden Oil" and "gurry". They are the only two commercial names. I know Mr. George A. Thompson and have known him about twenty years. On January 19, 1922, he brought specimens of Crude Menhaden Oil to analyze. He had with him a sample drawn from Reedsville and was alone. Sample was in tight tin.

"Q. 1. Will you look at either of those tins before you and see if you recognize it?

A. Yes, this [indicating] is the one. I recognize it from the label [referring to Defendant's Exhibit B]. Mr. Thompson left it there for analysis. I analyzed it for acid content and reported to Reilly, Edwards Company. Analysis showed 6.36 percent free fatty acid. I examined the sample the same day.

Q. 2. And from your experience with fish oils what would the contents of that sample be classified?

A. Prime A Crude Oil."

Later Mr. Thompson brought me another sample in two pint jars. Both were dumped into this tin [indicating Exhibit D]. I poured it myself. I filled this tin, Exhibit D,

and took from it a sample of the oil and gave it to Mr. Edwards. I analyzed that oil the same day. After I had made my examination of each of those samples, Mr. Edwards explained to me there was some trouble and I put them aside in the event of a court case of any kind.

"Q. 3. In the tins that are there?

A. Yes.

Q. 4. And they have been in your custody all the time since then?

A. Yes, sir."

The second sample was delivered to me on February 25th. I found free fatty acid content 6.54 percent. They were examined for tank-bottoms. I found none. I tested by taking some of it and dissolving it in petroleum ether.

[Witness is handed bottle, Defendant's Exhibit 8.]

I recognize the contents as tank-bottoms. The solubility test was made in Mr. Edwards' presence. He wanted to know if there were any tank-bottoms in them, and I made the experiment for tank-bottoms in his presence. There is con- [fol. 54] siderable free acid in tank-bottoms. It was not very excessive in this case. As a result of my examination of both these samples, they were "A Crude Menhaden Oil". In my opinion they are to be classified as "Crude A Menhaden Oil". All the solid fat in oil, like stearic acid and palmitic acid, are known as the stearin. They are solid fats to distinguish them from liquid fats. All fish oils contain stearin. It is a component part of fish oil, and it is absolutely necessary for it to be there. I should say that either one of these exhibits, D and C, were average samples of a shipment of fish oil. I should say Exhibit C was a pressed Menhaden oil.

"Q. 5. What would you say as to a percentage as high as 80 percent of stearin in fish oil?

A. If it were actually 80 percent of stearin in fish oil, even at the temperature of this room it would be as hard as hard butter. You could hardly press your finger through it without using force, at the temperature of this room."

The quality of the fish oil varies with the season during which the fish were caught. At some seasons of the year there will be much more stearin in fish than at others.

Cross-examination.

Mr. Cotter

I mean 80 percent by weight. Melting point of stearin is about 60 or 65 degrees Fahrenheit. If there was 80 percent stearin and the oil was heated to a temperature of between 80 and 90 there is no question but that it would flow freely. I am only vaguely familiar with the process of pressing oil.

Assuming that the process was functioning properly, and the strainer was in perfect condition, and the temperature was the proper temperature, and that less than one-fourth of that oil came out after the regulation time for the seeping process, assuming all these things, you would still have to do some assuming, namely, that 75 percent would have to be pure caked stearin before there would be any indication that it was not "Prime A Crude Menhaden Oil". I don't understand that press bags are used before the straining process. My understanding of winter pressed oil is that they would congeal it down to a certain temperature, which I thought was 30 or 40, and after it became congealed they would then put it in these press bags and press out the oil. I know what [fol. 55] the "graining process" is. I do not know whether after that it goes into the strainer in order to hold these particles that have been separated and, permit the liquid that had been separated to run through.

I never met Mr. Lee, the plaintiff's superintendent, until I saw him in the court-room. I have been examining for McNeal-Edwards for twenty years. There may have been twenty examinations in the course of a year. I know Mr. Thompson. He and I live in Baltimore, and are friends. I am still analyzing for Mr. McNeal.

"X Q. 6. Prime A Oil in your opinion should not contain more than five to eight percent of foots, should it?

A. It depends upon the temperature.

X Q. 7. Have you any opinion about it?

A. It would depend upon the temperature. At what temperature are you talking?

X Q. 7a. Well, say 55 to 60 degrees.

A. And by stearin you mean what will settle down in the bottle?

X Q. 8. By foots? That is what you mean by foots?

A. Yes. At 55 it is pretty hard to say because oil will vary so. I have seen oils at 55 degrees that will remain congealed at that temperature.

X Q. 9. You haven't any opinion as to what the amount in percentage of foots is in Prime A Menhaden Oil?

A. No; as I say, there are too many considerations upon which that rests."

Exhibit D was filled from two bottles,—two pint jars. They were shaken up well and one bottle was filled for Mr. Edwards. I kept my half right in this tin. The label was on one of the jars. I removed it from the jar and put it on the tin. I drew some out for the analysis and left what remained in the large can. It was just a test to see if there was any insoluble matter. There was none. I took 25 to 50 grams to make that test. The remainder was left in the can. I did not have to pour the entire can contents out into the glass vessel.

"X Q. 10. Did you put these two (Exhibits D and C) into these vessels yesterday, since you came to Boston?

A. This morning Mr. Thompson and I filed them on the [fol. 56] back bench there [indicating the spectator's seats]. I have made no test of either of those for the purpose of determining free fatty acid, since my original analysis. The amount of acid does not increase with the lapse of time unless there is some fish body left there to decompose. First test for acid was 6.36 and the second was 6.54. There was an increase in a month, and was within reasonable limits. I would say that both samples were good deliveries of Crude Oil. *I would say that both samples were good deliveries of Crude Oil.* There is a shade of difference in color; Exhibit C is somewhat darker than Exhibit D. I would say they are very similar, except for the slight difference in color."

Redirect-examination.

By Mr. French:

These cans, referring to the exhibits, remained in my possession unopened from the time I completed my second examination to this morning. They were opened in my presence this morning after being thoroughly shaken. I tested one of them, and there were no solid particles in it. Tank-bottoms are more visible in Crude Oil than stearin.

Recross-examination.

Mr. Cotter:

Stearin is desirable for some purposes. For pressed oil purposes, the less stearin the better for pressing.

Redirect examination.

By Mr. French:

Stearic acid is a component part of what is known as stearin. There is no routine method for analyzing and getting the stearin content of fish oil.

Recross-examination.

By Mr. Cotter:

Mr. Edwards did not, at any time in the month of June, 1922, turn over to me any samples with reference to this matter, that I recall. These are the only two that I had, that I recall. Reilly, Edwards paid me for my services.

HAROLD W. YOUNG (rebuttal):

Direct examination.

By Mr. Leach:

I was connected with Frank L. Young Company in 1922, and am now connected with Cook, Swan & Young. I had a talk with Mr. Thompson in 1926, in Baltimore. Think it was February or March. He said that he had examined a lot of 1,107 drums in Baltimore—I understood him to say in Baltimore—by examining one out of five, and out of that [fol. 57] one out of five, found seventy-five or eighty of them that should not be shipped as oil, and that he had reported that to Reilly of Reilly, Edwards.

[It is agreed that the physical exhibits introduced into evidence may be used at the arguments in the Circuit Court of Appeals.]

The drums in which the oil was shipped were attached by Frank L. Young Company in the suit originally brought in

the Superior Court for Suffolk County on September 15, 1922, and remained under this attachment until February 28, 1927. They were attached in the present suit of Frank L. Young Company v. McNeal-Edwards Company on February 25, 1927, and still remain subject to this attachment.

[The correspondence annexed to this bill and marked "Exhibits A to 1" took place between the parties in regard to the drums.]

At the close of the testimony the defendant submitted to the court the following requests for rulings:

DEFENDANT'S REQUESTS FOR RULINGS

1. Upon all the evidence your verdict must be for the defendant, McNeal-Edwards Company.

2. Upon all the evidence, Frank L. Young Company was bound, within a reasonable time, either (1) to refuse to accept the oil, and return it and the drums in which it was shipped to McNeal-Edwards Company, or (2) to accept the oil and return the drums.

3. Upon all the evidence, the plaintiff accepted the oil delivered under the contract in suit.

* * * * * * *

5. There is no evidence that the plaintiff "made known" to the defendant the purpose for which the oil delivered under the contract was to be used, and the plaintiff cannot recover under the third count of its declaration.

6. That where a person owes a duty to do an act by virtue of the obligation placed upon him by a valid contract, he has no right to knowingly do another act which will make it impossible for him to fullfil that obligation. To apply this to the case at bar Frank L. Young Company, owing a duty to [fol. 58] return the drums promptly, had no right by their intentional act to cause the drums to be placed in custodia legis, that is, under attachment, and to claim that they were therefore unable to so return them to McNeal-Edwards Company.

7. To so place them under attachment as described in the foregoing request, and to still retain them, constitutes a breach of the contract in suit, and your verdict must be for the defendant.

The court refused to give said requests numbered 1, 3, 5, 6 and 7, and the defendant duly excepted.

CHARGE TO JURY

The court charged the jury as follows:

MR. FOREMAN AND GENTLEMEN: I am going to send this case to you at first on special questions, as I told you. You will have a set of questions as to each case. That is, in the case of the Young Company against McNeal-Edwards Company and the case of McNeal-Edwards against the Young Company. You will find these questions are so put, Mr. Foreman, that you can answer yes or no; and the jury is to agree upon an answer to each question. Having done that, you will write in the answer yes or no, and having completed the answer you will sign the finding in each case, just as you agree.

Now, let me take up what we call the first case, the Young Company agaist McNeal-Edwards Company. The questions which you are to answer are, first, was the oil delivered by the McNeal-Edwards Company to Frank L. Young Company of the quality and grade called for by the contract sued upon. You will answer that, that it was or that it wasn't. If you find that it was, you need not consider the second question, which relates to damages and which reads as follows:

"If not what is the amount of the damage sustained by the Frank L. Young Company by reason of the inferiority in the quality of the oil?"

That calls for an answer in dollars and cents, but you need not answer that question if you are satisfied a good delivery was made nor unless the plaintiff has satisfied you that a good delivery was not made.

[fol. 59] Now, the question which you will meet here is obviously a pure question of fact. You have a situation

perfectly common, where one person has sold and another person has bought a certain common commodity by description in the sale note, and the parties are in disagreement whether what was delivered conformed in grade and quantity with what the contract called for. I know of no way I may assist you better than to give you a bird's-eye view of the evidence on that question. Counsel stressed different parts of the testimony, naturally, and I will try to run over in very brief, and perhaps in an inadequate way, but enough so as to recall to your mind the witnesses and the general character of the testimony, not the details. Now, the contract was for "Prime A Crude Menhaden Fish Oil". That is what that called for. And there is no doubt the McNeal, Edwards Company sent forward to Boston some 1,107 drums of what it said was that sort of oil; and those drums were received by the Young Company and the contents were regarded by the Young Company as not being Prime A Crude Menhaden Fish Oil.

The first of the witnesses was Mr. Lee, who was the superintendent at this time of the Young Company, and he said that this was a whitish, thick, pasty stuff, which would not flow as freely as Grade A Menhaden Oil should flow, and, that it took on the average a half hour to empty a drum when the drum ought to have freed itself in five to ten minutes. He says there were large lumps in it, fish heads and one whole fish, a Menhaden fish. He said that the oil when put into the factory wouldn't process properly; that it cost instead of two cents, which was the average cost of processing, about 10 to 12 cents a gallon to process this oil, and that the delivery was not a delivery of oil according to the contract requirements.

The next witness for the plaintiff was Mr. Sears, who was an oldish man, a workman, who worked in their chilling room; and he said he had worked there a good many years, thirty-five or more; that, as he first saw this oil, it seemed to be much the same as any other oil, but it did not process like other oils, and that when he came to drain it the residue was much greater than it ought to be. As I remember it [fol. 60] he said that about three-quarters ought to drain away of what was put in the bag, and in this case only one-quart of what was put in the bag or less drained away; and that it would not drain when filled, so that it could not be well separated, the stearin from the liquid oil. When it

had water in it, it made it sloppy, and after it had been through the press, instead of being a hard, firm and greasy cake, the residue was slimy and soft. So, Sears said it was not what he understood by this Grade A of oil.

Schutt was the next witness, a working man, a smaller man. He also said he had been thirty-five or thirty-six years at work in this plant; that this oil would not dump right. He worked on it apparently before Sears did. They had trouble in getting it out of the barrel and, as Schutt said, it was a dirty lot and took half an hour to dump the drum; that it was slimy and left no cake after they had pressed it; and he said he had never seen anything like it in the way of Menhaden oil.

Then Mr. Percy Young said it was very thick; that it had practically no free oil; that the foots were eighty percent instead of about eight percent, and that it was not Prime A delivery. He said the oil which was delivered was worth about 17 to 18 cents instead of about 33 cents, which we may assume was the price of Grade A, because that was the price at which the parties traded.

The next witness was Rounsevell, who had been employed by the plant in New Bedford and had come up to Boston while this oil was being handled there; and he said he saw a certain number of barrels, I think in round figures fifty, it may be more or less, that had water in it and had waste in it. It was so thick and slimy it did not separate well in the processing, and it was not in his opinion a good delivery of Grade A.

The last witness for the plaintiff was Mr. Murphy, who said he had been forty odd years connected with them. He found fault with this delivery because it was very thick, because it had an excess of foots, and he said there were what looked to him tank-bottoms in it. He thought the oil, instead of being a good delivery of Grade A, was an [fol. 61] odd lot outside of all the trade designations, and he thought it was worth about 17 or 18 cents.

That was the case in the outline submitted to you by the plaintiff in the principal case, on which they ask you to return a verdict as you have observed for about $9,600 in damages, being the difference in the value of the oil delivered and the kind of oil which the contract called for.

On the other side a very different picture was given you. Mr. Thompson was their first main witness. He lives down

in Baltimore, or near there, and is a sampler and grader of oils, and has been in that business many years; and he is a State officer, very much as a wood-measurer is a sworn officer with us, or a weigher is a sworn officer. The Commonwealth has those sorts of men under oath to perform an every-day job honestly. He says he was called down to the McNeal, Edwards plant at Reedville, Virginia, and went through in a cursory way this lot of oil; that he examined one in five of the 1,107 drums, and he did so before it was sent north. That was on January 16, and he thought there were perhaps 75 barrels that were heavy and thick. He didn't leave it entirely clear whether that was 75 out of the 220 he examined, or whether from his examination he thought there were 75 in the whole lot. His statement was not clear on that either way. It would make quite a little difference whether you say there were 75 barrels out of 1,100, or whether you say there were 375 out of 1,100. He regarded the oil as a proper Grade A Oil with the exception of 75 drums that he regarded as heavy. He didn't say those were out of the grade, but they were rather heavier than is customary. Then, after the dispute between the parties developed Mr. Thompson came at the suggestion and the expense of the broker and made a complete examination of this oil at the plant of the plaintiff in South Boston, sampling each of the 1,100 drums and making out of those samples about six gallons that had been drawn, and then cutting that down and averaging it so that finally he took from it three pint jars, which he says was a fair average sample of the lot. He left one of these jars with the Young Company and he took two of them with him down to [fol. 62] Gascoyne at Baltimore and turned those over to Gascoyne. Mr. Thompson says that while there were 70 or 75 barrels of thick or weak oil, he regarded the shipment as a whole as a proper delivery of Grade A Crude Menhaden. He said that he couldn't think of passing as Grade A a delivery which had heads and dirt in it; that he had never seen anything of that sort tendered as a delivery. So you see really there isn't so much question there about this standard which you are to apply. But, pressed a little further about his idea of the standard, Mr. Thompson expressed views radically different from those which had been expressed by the witnesses called by the plaintiff, upon this very important point of the essential qualities of a

Grade A. Mr. Thompson expressed the view that the Grade A Oil had no relation to anything except color, sweetness and presence of water and the presence of tank-bottoms, and that an excess of foots even to any amount was not a matter which was to be taken into consideration in the grading—a very different position, you observe, as to the meaning of Grade A from that taken by the witnesses for the plaintiff. It is put to you by the other side that Mr. Thompson's experience has not been so much in the grading of oil completely as in certain other dealings with it largely on matters of gauging and that sort of thing.

The next witness in the logical order—I am taking him out of order in the case—was Mr. Gascoyne of Baltimore, the chemist, who told you that Mr. Thompson came to him with these two pint bottles or jars of samples, the other jar having been left with the Young Company in Boston; Thompson turned over these two pint jars to Mr. Gascoyne, so Gascoyne says. Gascoyne says he examined it; and he has produced here the identical stuff that Thompson turned over to him, which is the stuff that is in one of these two bottles that had the darker color. The other one of those comes from a can which I understand is said to represent the shipment on the original sample. Mr. Gascoyne told you that one of these samples is part of the identical sample drawn by Thompson in February, 1922, in Boston and delivered by Thompson to him and turned by him into that [fol. 63] tin can next to the stenographer, from which it was taken and put into this bottle. Mr. Gascoyne expresses the opinion that the oil in that bottle is a good delivery of Grade A Crude Menhaden.

Then the next witness was Mr. McNeal, the manager and responsible head, apparently, of the McNeal, Edwards Company, the defendant in the first case. He described to you rapidly the way in which this Menhaden oil is made, about the fish being caught and being brought into the oil works and what was done to them afterwards. The gist of it was that the fish were put into the cooking tank and cooked— that broke up the flesh, I suppose and from that time they were handled by machinery through presses and so forth, and the oil was squeezed out of them and then drained through a rather coarse strainer to a tank. There was a separating tank or a settling tank, and a chilling tank, and finally perhaps a receiving tank. The exact steps

there are not very important. The gist of them is that from the presses where the oil is squeezed out it is strained and then handled through two-inch pipes and inch and a half pipes and, finally, a one-inch pipe, being handled by pumps. And it is put to you that the method of handling utterly refutes and makes impossible any such impurities as the plaintiff says existed in this shipment; that you can't pump a Menhaden through a pump, or run it through an inch and a half pipe, and still less an inch pipe. He says there were no impurities in the oil, that it was all handled in that way and was a good delivery. He did say that it was pumped out of the tank and the delivery comprised all the oil in the tank; that they left, however, about six inches in the bottom of the tank as "settling". He also said that it being winter the oil was heated artificially, I understand, so it would flow readily when they were barreling. The oil was then,—to follow it through,—put into the barrels, he says, and shipped north.

Now, that is in a very cursory way the evidence on both sides about this crucial question. The evidence is clearly contradictory as you observe. One way of deciding where the truth lies is to begin by seeing what facts are either agreed or are not seriously in dispute. Here you are faced at the outset, as I have said, with a disagreement as to the [fol. 64] standards of grading. The plaintiffs regard Grade A as meaning obviously an oil which is freer from non-oleaginous substance, or which must contain in other words a greater volume of free liquid oil than the defendant does. And you must decide that question on the evidence, accepting one view or the other. It is to be said that Thompson and Gascoyne both adhere to the standard grading maintained by them, that is, in substance that the presence of foots had nothing to do with grading. So what is the standard? Who is right about it? Mr. Gascoyne says that if you got 80 percent of foots the oil would be almost as hard as butter. It is evident, I think, gentlemen, that somewhere, dealing with oil, you must reach a point where there would be so much of this stearin or foots in it that the more reasonable view would be that it was not a delivery of oil. But that is a question as to which you are absolutely and finally the judges on the evidence here.

Again, it appears that this oil was admittedly the last of the season's run. The amount in the sale note is indefinite

—1,000 to 1,200 barrels, and it is said by the parties that that is because they understood the McNeal, Edwards Company was selling what it had left and was uncertain just what the amount would be. And that perhaps opens the door to a suspicion that in pumping out the last of the tank a good deal of the heavier stuff might get worked over without anybody being greatly at fault. Of course we are not balancing or charging faults here. We are trying to decide whether the oil delivered was Grade A Crude Menhaden. We are not concerned with blameworthiness in the least. It is an up and down question, whether the contract was complied with.

Then, again, there may have been some misapprehension with regard to the delivery. Covington in his letter certainly appears to have been under a misapprehension when he speaks about the contract as being for the oil that was in the tank, and that "you are buying the residue of the tank". That is not so. The contract was for 1,000 or 1,200 barrels Grade A Crude Menhaden, and it was warranted to be, all of it was warranted to be, of the grade stated. Some of the evidence of the Young Company might well be [fol. 65] put to you as drawing a pretty long bow. Someone has to exercise a good deal of ingenuity as to how a Menhaden fish can get into a steel drum and get out again; as well as fish heads. And one has to consider also the absence of the sample,—a very curious thing that. The parties know they have a dispute. A man comes up from Baltimore and draws a sample and leaves it with them; and it is not produced. I think you would be well justified in accepting these samples here in view of there being nothing to contradict them. If you do accept them, this sample was just like what was left with the Young Company by Thompson. I think you may well pay some attention to that sample. You and I don't know very much about Menhaden oil; but it is put to you that that sample certainly has stood before us for a couple of days and shows no great inclination to settle into very clear oil. It may be that the real dispute between these parties is nothing that involves anyone's truthfulness and honor, as much as it does as to how much stearin or foots is fairly permissible in a commercial Menhaden oil. It may be that what happened was that they were pumping out the tank and a great deal more than

usual of this stearin got into the oil and perhaps a little of tank-bottom, more or less of the tank-bottom, got into it. It would seem hard to imagine that people like Schutt and Sears and Rounsevell are lying about it when they say this oil was congealed stuff when they saw it in January and would not run. And it may be that that is the issue which you will find the determining issue in the case. I don't mean to state that that is my opinion, still less to impose it upon you. I am just suggesting it as a view of the case which you may possibly take.

If you think the delivery was a good delivery just say so and pass by the question of damage, Mr. Foreman. If you think it wasn't, you will have to come to the question of damages. Now, the damages would be the difference between the value of the goods delivered, that is, the value of this lot of goods and the value of the goods if they had been what the contract called for. In other words, if we assume that the contract price of this oil was the market value at [fol. 66] the time and place of sale which is a fair enough assumption, nothing here to contradict it, then the value of Prime A Crude Menhaden was about 33 cents; and if you are prepared to accept the testimony of Percy Young and Lee, the value of the oil at that time was 17 or 18 cents, making a difference of 16 or 17 cents a gallon which the Young Company lost by reason of the delivery of oil of an inferior grade instead of what had been agreed upon. That works out in money on 60,700 gallons, at some $9,600 or $9,700. Eleven hundred and seven drums of 55 gallons each come to 60,885 gallons, and at 16 cents that comes to something like $9,741. Whatever figure you take,—and you will naturally say that when Mr. Young and Mr. Murphy tell you that this oil they got was only worth 16 or 17 cents they are not overstating the value of it,—whatever you think the allowance will be, you will apply that in money, and then add interest on that amount from March 6, 1922, and that will be your damages.

Let us turn now to the next case—the McNeal, Edwards Company against the Young Company. I think, gentlemen, this is a very good time to stop for the day. It is not quite four o'clock. I will leave the charge open and instruct you about the residue of the case tomorrow morning at ten o'clock.

[Adjourned at 3.50 p. m. to be resumed Friday, February 10, at 10 a. m.]

Friday, February 10, 1928—10 a. m.

The COURT: Mr. Foreman and gentlemen: Yesterday afternoon I finished what I had to say to you about the special issues in the Young Company v. McNeal, Edwards Company, and I now come to the special issues in the second case of McNeal, Edwards Company v. Young Company.

The questions are simple enough and I think you will understand them without much explanation except perhaps as to the first. The first question is: Was the retention of the drums by Frank L. Young Company from the time they were received, about the 25th of January, 1922, to the 15th [fol. 67] of September, 1922, when they were attached, an unreasonably long retention of them? You will say whether it was or wasn't.

You may want to know what is meant by the expression "unreasonable long retention of the drums". Here was a contract by which the Young Company was buying down in Baltimore, Maryland, oil which had to be shipped up either in tanks or containers. The method provided in the contract was to ship in containers, in drums. Of course, some arrangement had to be made about the drums, either they were to be bought as part of the oil, or they were to remain as the property of the seller and be returned to the seller. The latter was the arrangement upon which the parties agreed. The oil is to be furnished in drums and the drums are to be returned to the seller, freight prepaid—that is the contract for the drums.

So that your property, Mr. Foreman, is coming forward to me in your drums, and I have agreed after I run the oil out to return the drums to you. The contract doesn't say how long I shall keep the drums, but the law fills that gap in the contract saying that I may keep those drums a reasonable time to enable me to carry out the contract which you and I made between us.

Now, how are you to decide what a reasonable time was. Well, you are to decide it in view of the circumstances in this particular transaction. The facts that a dispute arose

immediately upon inspection of the oil, and that under those circumstances it certainly would be a reasonable thing for the buyer to call its opinion of the inferior quality of the oil to the attention of the seller before the oil was emptied, and at least to give the seller an opportunity to inspect it in the drums—that would seem, too, a reasonable view. Once the oil was emptied out of the drums the door would be opened for argument as to whether it had been changed or mixed, which would not exist if the seller had inspected the drums in the original shipment. So, I think we will all agree that the retention of the drums for a certain time for that purpose was plainly reasonable.

Now, how long would that last. Thompson came up in February and made at the request of the broker, Reilly-[fol. 68] Edwards, a second sampling of the oil; and he left for the south in the latter part of February, the 22d or the 23d, having left a sample here with the Young Company. There was more or less correspondence between the parties, less rather than more, but there can be no doubt, I imagine, that the McNeal, Edwards Company understood that this oil was very much objected to on quality and grade by the Young Company. They knew certainly in the summer of 1922 that the oil was still in the drums, being held there. It was so stated in the letter of July, 1922, in which they hoped that the McNeal, Edwards Company would again send somebody up to check over the quality of it.

Another reason given by the Young Company for not emptying the drums and sending them back sooner is that the oil wouldn't run in cold weather; that it really couldn't be handled. Well, you run into a conflict between the parties as to the character of the oil in the proper grade. The plaintiff's witnesses, Lee at least, and some of the others I think, said that Prime A Crude Menhaden would run in cold weather; that a barrel would empty in perhaps five to ten minutes in cold weather. There is no testimony on that point as far as I recall from the witnesses who testified for the McNeal, Edwards Company. The men who tried to handle the oil up here said it would not run in cold weather; and looking at those samples there, one of which seems to be pretty solid, one may wonder—I pass the question absolutely to you—whether that would run if it was chilled to 30 or 32 degrees. I see it at 70 degrees here in the court, I suppose. The testimony of the McNeal, Edwards Com-

pany was that they had to heat the oil and did heat it by steam in order to fill it in the barrels. You will remember the evidence, no doubt, pro and con on this point. The significance of it in this question is that one of the reasons advanced by the Young Company for retaining these barrels such a long time was that they retained them because they had to keep them until warm weather, until the oil would soften up and melt enough to run out of the barrels. They said they did that some time in August. They said they did it in the heat of the summer and the barrels re- [fol. 69] mained around until the 15th of September, simply waiting the return shipment to the seller.

On the 15th of September the situation was evidently regarded by the Young Company as such that they instituted proceedings by attaching these barrels in their possession as the property of the McNeal, Edwards Company. Of course that puts them into the custody of an officer of the law, and from that time we are not concerned with the Young Company's failure to return them, because they were apparently out of it. The drums being in the custody of the law, of course it was beyond the power of the Young Company to return them, and their failure to do so stands as excused by operation of law.

So, the question which you are to answer is as to the reasonableness of the Young Company's contract in holding on to the drums until September 15. If you think that they ought to have emptied those drums and shipped them back sooner, then you will say there was an unreasonable long retention of them, and you would answer that question in the affirmative,—that the retention was unreasonable. If you think on the whole they were justified to hold them until September 15 you will say no. If you say there was an unreasonable retention of the drums, the next question is how much that damaged in dollars and cents the McNeal, Edwards Company,—that is, damage for the use of the drums while they were retained.

There isn't much evidence to go on. Nobody has said what the monthly rent or the yearly use of the drums was worth. You have been told what they cost when new. You have had very conflicting evidence of the value of these drums, and if you come to that question you will have to use your common sense and do the best you can as to the amount of money involved. If you come to the matter of damages

for unreasonable retention, it is not the value of the drums at all but just the value of the detention, what we call in the admiralty court "demurrage" on the drums.

And the last question is what was the fair value of the drums on the date of attachment, September 15, 1922. I am [fol. 70] asking you to state that value because that may become important in a certain aspect of the case. It means the fair value of the drums as they then were. Upon that, Mr. Sullivan said that they were worth 75 cents and he thought they were a pretty poor lot. Mr. McNeal said they were worth $3.50, and Mr. Lee, or perhaps Mr. Murphy, said they were worth 75 cents. Mr. McNeal said they were a lot of drums in good condition. He won't say that they hadn't been used before; but they were, he says, in good condition and had cost $4, which was the market for new drums at that time. On the other side, it was said that they were "one-trip" drums anyway, and that they had done a good many more than one trip. Sullivan said that they were scaled and rusted and he thought 75 cents was all they were worth. You have to make up your mind what the fair value is and when you have answered the question just sign those and come back with the answer.

The Court: I omitted to say one thing that concerns the burden of proof. I am very properly reminded of it by counsel. Let us take the first case—the Young Company. "Was the oil delivered by McNeal, Edwards Company to Frank L. Young Company of the quality and grade called for on the contract sued upon?"—the Young Company, suing for a breach of warranty here, undertakes to prove to you by a fair preponderance of evidence that the oil was not of the quality and grade called for by the contract. They don't undertake to prove it beyond a reasonable doubt or anything of that sort; but they must satisfy you that it is distinctly probable that the oil was not of the quality or grade called for, or you should answer that question that the oil was of the grade called for.

As to damages, damages must be proved in the same way by a fair preponderance of the evidence. The mere assertion that a thing is worth a million dollars is no evidence that it is. The proof must carry it up to the point of value.

And in the same way as to the retention of the drums.

The McNeal, Edwards Company is asserting they were re-
[fol. 71] tained an unreasonable time. That must be proved —they must prove that the retention was unreasonable by a fair preponderance of the evidence; and that principle applies to the other question. Of course it follows that if your mind is left absolutely in doubt about any question you do not find in the affirmative on that question.

SPECIAL QUESTIONS TO JURY

The following special questions were put by the court to the jury, and answered by them as follows:

"1. Was the oil delivered by McNeal-Edwards Company to Frank L. Young Company of the quality and grade called for by the contract sued upon?"

To this the jury answered, "No."

"2. If not, what is the amount of the damages sustained by the Frank L. Young Company by reason of the inferiority of the quality or grade of the oil delivered?"

To this question the jury answered, "$10,730.17."

The jury returned a verdict for the plaintiff in the sum of $10,730.17.

The following special questions were put by the court to the jury in the case of McNeal-Edwards Company v. Frank L. Young Company, tried with this case and were answered by them as follows:

"1. Was the retention of the drums by Frank L. Young Company, from the time when they were received (about January 28, 1922) to 15 September, 1922, when they were attached, an unreasonably long detention of them?"

A. "Yes."

"2. If the jury answers the foregoing question in the affirmative, what money damage did McNeal-Edwards Company sustain because of the unreasonable detention of the drums by Frank L. Young Company?"

A. "$100."

"3. What was the fair value of the drums on September 15, 1922?"

A. "$1384."

Subsequent to the rendition of the verdicts as aforesaid, [fol. 72] and before the entry of judgment, the defendant filed the following motion in arrest of judgment:

MOTION IN ARREST OF JUDGMENT

"Now comes the defendant in the above-entitled cause, after verdict, and, appearing specially, moves that judgment therein be arrested on the grounds—

1. That it appears upon the record that this court has never acquired jurisdiction of this defendant.

2. That it appears upon the record that the service made upon the defendant's attorney was void and of no effect;

3. That it appears upon the record that the District of Massachusetts is not the proper venue for hearing and determining said cause; and

4. That the alternate, or conditional, verdict rendered by the jury, at the request or direction of the court, was a violation of the defendant's right to that trial by jury secured to it by the Seventh amendment to the Constitution of the United States."

The court overruled the motion, and the defendant duly excepted.

The defendant, being aggrieved by said verdicts and by said refusals to rule, brings this bill of exceptions and prays that the same be allowed.

McNeal-Edwards Company, by Its Attorney, Asa P. French, Appearing Specially. Clarence S. Towles, of Counsel.

ORDER ALLOWING BILL OF EXCEPTIONS

July 6, 1928.

The foregoing bill of exceptions is allowed.

James M. Morton, Jr., U. S. District Judge.

[MEMORANDUM.—Copy of defendant's answer and defendant's plea in abatement as amended marked respec-

tively "A" and "B" are here omitted as they already form part of this Transcript of Record and will be found printed on pages 9-11, 13 of this volume. James S. Allen, Clerk.]

[fol. 73] EXHIBIT "C"

UNITED STATES DISTRICT COURT

Docket No. 2054

Law Docket

Title of Case

FRANK L. YOUNG COMPANY

v.

THE McNEAL EDWARDS CO.

December Term, 1926.

Attorneys, Warner, Stackpole & Bradlee, E. Barton Chapin, 84 State St., Boston; Richard J. Cotter, for Plaintiff. Asa P. French (specially Jonathan W. French) for defendant.

Date			Filings—Proceedings
Month	Day	Year	
Jan.	2,	1923.	Entered by defendant: Record of State Court filed and entered. (1) Writ (2) Declaration (3) Motion (4) Order of Notice, (5) Special Appearance, (6) Petition for Removal, (7) Affidavit of Notice, (8) Bond on Removal, (9) Docket entries.
	5,		Appearance of Asa P. French and Jonathan W. French, Specially for defendant, filed.
	5,		Answer filed.
Aug.	9,		Appearance of Warner, Stackpole & Bradlee and E. Barton Chapin for plaintiff filed.
Sept.	27,	1923.	Appearance of Richard J. Cotter for plaintiff filed.
Feb.	16,	1924.	Plaintiff's motion for continuance filed.
	16,		Affidavit in support of continuance filed.
Sept.	15,	1925.	Agreement for marking case for trial calendar for Sept. T. 1925, filed.
Feb.	28,	1927.	Discontinuance filed.

[fol. 74] EXHIBIT "D"

UNITED STATES DISTRICT COURT

Docket No. 2071

Law Docket

Title of Case

McNEAL EDWARDS COMPANY

v.

FRANK L. YOUNG COMPANY et al.

March Term 1928.

Attorneys: Asa P. French, Jonathan W. French for Plaintiff. Richard J. Cotter, Warner, Stackpole & Bradlee for Defendant.

Date (Month Day Year)	Filings—Proceedings
Mch. 20, 1923.	Writ filed.
20,	Declaration filed.
20,	Appearance of Asa P. French and Jonathan W. French for Plaintiff, filed.
Apr. 9, 1923.	Appearance of Richard J. Cotter and Warner, Stackpole & Bradlee for defendant, filed.
9,	Answer filed.
Sept. 15, 1925.	Agreement for marking case for trial calendar for Sept. Term, 1925, filed.
Dec. 14, 1926.	Motion that case be added to trial list for Dec. Term, 1926, assented to, filed.
Feb. 21, 1927.	Defendant's motion for specifications filed.
23,	Affidavit of notice filed.
28,	Brewster, J. On defendant's motion for specifications, no one appearing in opposition, motion granted, 21 days being allowed for the filing of the specifications and 5 days more thereafter to enter a new cross-action. (entered).
Mar. 18,	Plaintiff's specifications filed.
Feb. 7, 1928.	Morton, J. Jury trial begins, jury impanelled, Charles Bailey, Foreman, adjourned to Feb. 8, 1928 (entered).

[fol. 75]

Date			Filings—Proceedings
Month	Day	Year	
Feb.	8,	1928.	Morton, J. Jury trial continues; adjourned to Feb. 9, 1928 (entered).
	9,		Morton, J. Jury trial continues; adjourned to Feb. 10, 1928 (entered).
	10,		Morton, J. Jury trial continues; committed to jury; special findings by jury; alternative verdict for plaintiff in the sum of $100; time for filing bill of exceptions on each side extended 60 days from date of verdict. Verdict filed (entered). Case tried with Law No. 3021.
June	25,	1928.	Morton, J. Judgment on the verdict for plaintiff in the sum of $100 damages and $2.50 interest; judgment entered on the last day of the term under general order of court pursuant to Rule 51 (entered).

EXHIBIT "E"

United States District Court

Docket No. 3021

Law Docket

Title of Case

FRANK L. YOUNG CO.

v.

MCNEAL EDWARDS CO.

Attorneys: Warner, Stackpole & Bradlee, W. B. Leach, Jr. 84 State St., Boston for Plaintiff. Asa P. French, Specially 45 Milk St., Boston for Defendant.

Date			Filings—Proceedings
Month	Day	Year	
Feb.	21,	1927.	Motion for special precept filed.
	21,		Lowell, J. Motion allowed, special precept to issue as prayed for (entered).

Date			Filings—Proceedings
Month	Day	Year	
Feb.	23,		Special precept issued.
Mar.	3,		Special precept served by Marshal Feb. 25, 1927, filed.

[fol. 76]

Mar.	22,	1927.	Writ entered late by order of court.
	22,		Declaration filed.
	23,		Special appearance of Asa P. French for defendant filed.
	24,		Defendant's motion to dismiss filed.
	24,		Plea in abatement filed.
	30,		Affidavit of notice filed.
Apr.	4,		Defendant's motion to amend its plea in abatement filed.
	4,		Plaintiff's motion to add case to March Term Jury Trial List filed.
	5,		Certificate of notice filed.
	11,		Lowell, J. Heard on defendant's motion to dismiss, taken under advisement; replication to plea in abatement filed.
	21,		Lowell, J. Memorandum on motion to dismiss;—Motion denied. Memo. filed (entered).
	22,		Answer filed.
	23,		Defendant's claim of exception filed.
	26,		Plaintiff's motion to put case on trial list filed.
	27,		Defendant's claim of exception filed.
	27,		Lowell, J. Further Memorandum on plea in abatement:—Plea overruled (entered as of April 26). Memo. filed.
	29,		Defendant's motion to extend time for filing its bill of exceptions, assented to, filed.
Apr.	29,	1927.	Lowell, J. Motion allowed and time for filing bill of exceptions to order denying motion to dismiss and overruling plea in abatement extended to and including twenty days after the verdict shall be rendered (entered).

Date			Filings—Proceedings
Month	Day	Year	
May	2,		Lowell, J. Heard on plaintiff's motion to put case on trial list; motion denied (entered).
Feb.	7,	1928.	Morton, J. Jury trial begins; jury empanelled, Charles Bailey, Foreman; adjourned to Feb. 8, 1928. (entered).
[fol. 77]			
Feb.	8,	1928.	Morton, J. Jury trial continues; adjourned to Feb. 9, 1928 (entered).
	9,		Morton, J. Jury trial continued; adjourned to Feb. 10, 1928 (entered).
	10,		Morton, J. Jury trial continues; committed to jury; special findings by the jury; alternative verdict for plaintiff in the sum of $10,730.17; time for filing bill of exceptions on each side extended 60 days from date of verdict. Verdict filed (entered) (tried with Law No. 2071).
	14,		Defendant's motion for a new trial filed.
	14,		Defendant's motion in arrest of judgment filed.
	27,		Defendant's motion for extension of time for filing interlocutory bill of exceptions filed.
	27,		Morton, J. Motion allowed, time for filing exceptions to order overruling plea in abatement extended until time for filing exceptions to verdict expires (entered).
Apr.	9,		Morton, J. Defendant's motion in arrest of judgment denied, exception saved (entered).
	9,		Defendant's bill of exceptions filed.

EXHIBIT "F"

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS

No. 2071

McNEAL-EDWARDS COMPANY

v.

FRANK L. YOUNG COMPANY

Plaintiff's Declaration

First Count (in contract). And the plaintiff says that on or about the third day of January, 122, it sold to the defendant eleven hundred and seven (1107) barrels of Prime "A" Crude Menhaden Fish Oil, and shipped the same from its plant in Reedville, Virginia, to the defendant at Boston, in containers known to the trade as drums; that it was a part of the defendant's obligation under the contract for said sale forthwith to remove the oil from said drums and [fol. 78] to return the latter, freight prepaid, to the plaintiff at said Reedville; but the plaintiff has refused and neglected and still refuses and neglects to return said drums to the plaintiff as aforesaid to the great damage of the plaintiff as set forth in its writ.

Second Count (in tort). And the plaintiff says that on or about the twenty-third day of July, 1922, the defendant wrongfully converted to its own use eleven hundred and seven (1107) containers or drums of the value of three dollars and fifty cents ($3.50) each, belonging to the plaintiff, to the plaintiff's great damage as set forth in its writ.

McNeal-Edwards Company, by Its Attorneys, Asa P. French, Jonathan W. French. Clarence S. Towles, of Counsel.

EXHIBIT "G"

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS

No. 2071. Law

McNEAL-EDWARDS COMPANY

v.

FRANK L. YOUNG COMPANY

PLAINTIFF'S SPECIFICATIONS

Now comes the plaintiff in the above-entitled cause and, complying with the order of the court upon the defendant's motion for specifications therein, says:

(1) There was no agreement in writing between the parties setting forth the terms of the contract referred to in the first count of the plaintiff's declaration. The contract was partly oral and partly by correspondence. It is fully set forth by this defendant in its suit against this plaintiff pending in this court and numbered 2054 Law.

It was an implied obligation of said contract, based upon the universal custom of the trades in which both the plaintiff and defendant were respectively engaged at the time of the transaction in suit, that the vendee, upon receipt of [fol. 79] the oil, should remove it from the drums forthwith, and return the latter, freight prepaid, to the vendor without demand therefor.

(2) a. No. See specification 1 supra.
b. See specification " (2) a", supra.
c. See specification " (2) a", supra.
d. See specification " (2) a", supra.
e. See specification " (2) a", supra.
f. See specification " (2) a", supra.
g. See specification " (2) a", supra.
h. See specification " (2) a", supra.
i. See specification " (2) a", supra.
j. See specification " (2) a", supra.
k. See specification " (2) a", supra.

(3) The plaintiff has been deprived of the use of the drums for more than five years, and has been put to the ex-

pense of obtaining others, and is informed and believes, and expects to show at the trial, that said drums, while in the possession of the plaintiff, have been exposed to the weather and have been otherwise so negligently cared for that they are now worthless, and that the plaintiff has been damaged thereby to the extent of their fair market value at the time they were received by the defendant in January, 1922, namely, $3,874.50 with interest.

McNeal-Edwards Company, by Its Attorney, Asa P. French.

DEFENDANT'S EXHIBIT A

Reilly-Edwards Company (etc.)

April 22, 1922.

The Frank L. Young Company, #111 Purchase St., Boston, Mass.

DEAR SIRS: We have today received a letter from the McNeal-Edwards Company reading:

"In regards to the drums that this lot of oil was shipped in, they were to be returned in a reasonable time and we think they have had time enough to dump them so please get after them to ship the drums back to us at once."

[fol. 80] Kindly give this matter your immediate attention and advise us when you will forward these drums back to the McNeal-Edwards Company.

Yours very truly, Reilly Edwards Company, by Edward J. Robel (?).

DEFENDANT'S EXHIBIT 3

July 12, 1922.

Reilly-Edwards Co., Baltimore, Md.

Attention Mr. W. T. Edwards

GENTLEMEN: We are enclosing herewith a letter which we received today from the Foreign Traders Company, Inc., 154 Nassau St., New York City, wherein they inquire

for price, etc., on Fish Guano. We are passing this along to you in hopes that it may be of interest to you.

In regard to empty drums for McNeal-Edwards Co., as mentioned in your letter of the 7th inst., would say that as advised by phone we are not in a position to furnish the drums until they are empty, and we do not feel like emptying the drums until after McNeal-Edwards have had an opportunity to see for themselves, in the original packages, the kind of oil they shipped us.

We hope you can get them to be reasonable and come up and see the goods, as we requested. It certainly is not fair to make us hold the goods any longer than we have.

Hoping to hear from you promptly in regard to this matter, we are

Very respectfully, Frank L. Young Co.

CJM-W. Enclosure.

DEFENDANT'S EXHIBIT 2

The McNeal-Edwards Co.

Reedville, Va., July 19th, 1922.

The Frank L. Young Co., Boston, Mass.

GENTLEMEN: We have been waiting very patiently for you to return our 1107 drums that we shipped you Jan. 18th but it seems that you have made no attempt to do so, we are sorry to have to keep after you about this matter as [fol. 81] it is embarrassing to have to do business in this way, but we must have our drums as we need them to ship out oil now and if you cannot ship all ship what you can, please advise when and how many you will ship. We are

Yours truly, The McNeal Edwards Co. W. T. Covington.

DEFENDANT'S EXHIBIT 1

22 Aug., 2 p. m., 4:11, Reedville, Va.

Frank L. Young and Co., 111 Purchase Street, Boston, Mass.:

Have you shipped any of our drums if not when and how many. Answer

McNeal Edwards Co.

IN UNITED STATES DISTRICT COURT

MEMORANDUM ON MOTION TO DISMISS—April 21, 1927

LOWELL, J.:

Motion to dismiss. It is argued that the action was not properly begun by service on the attorney of the non-resident defendant under Section 3 of Chapter 227 of the General Laws of Massachusetts. The contention is that as the former action brought by the present defendant was in the nature of a cross-action, the statute cited does not cover it. This contention is, in my opinion, without merit. Motion denied.

IN UNITED STATES DISTRICT COURT

MEMORANDUM ON PLEA IN ABATEMENT—April 26, 1927

LOWELL, J.:

The principal contention was the same one mentioned in the motion to dismiss, which has already been refused. The other contention was that there was already pending in this court another suit between the same parties and for the same cause of action. I rule that the former suit is not precisely similar to the present one, in that personal jurisdiction had not been acquired over the defendant in this suit, and the matters in controversy between the parties could not be thoroughly settled in the former suit.

Plea overruled.

[fol. 82] IN UNITED STATES DISTRICT COURT

DEFENDANT'S PETITION FOR APPEAL—Filed January 31, 1929

Now comes McNeal, Edwards Company, and says that, on or about the twenty-seventh day of November, 1928, this court entered judgment in the above-entitled cause in favor of the plaintiff and against the defendant, in which judgment, and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of the defendant, all of which are set forth specifically in the assignment of errors filed herewith.

Wherefore, the defendant prays for leave to appeal to the United States Court of Appeals for the First Circuit, for the correction errors so complained of, and that a transcript of the records, proceedings and papers in said cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

McNeal, Edwards Company, by Its Attorney, Asa P. French. Clarence S. Towles, of Counsel.

January 31, 1929.

Petition for appeal allowed.

J. M. Morton, Jr., U. S. District Judge.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ASSIGNMENT OF ERRORS—Filed January 31, 1929

Now comes the defendant, McNeal-Edwards Company, and assigns as errors on the part of the court, at the trial of the above-entitled action, the following:

1. The court erred in overruling the defendant's plea in abatement.

2. The court erred in overruling the defendant's motion to dismiss.

3. The court erred in overruling the defendant's motion in arrest of judgment.

4. The court erred in refusing, over the objection and [fol. 83] exception of the defendant, to give the following instruction requested by the defendant, namely,

"Upon all the evidence, your verdict must be for the defendant, McNeal-Edwards Company."

5. The court erred in refusing, over the objection and exception of the defendant, to give the following instruction requested by the defendant, namely,

"Upon all the evidence, the plaintiff accepted the oil delivered under the contract in suit."

6. The court erred in refusing, over the objection and excepton of the defendant, to give the following instruction requested by the defendant, namely,

"There is no evidence that the plaintiff 'made known' to the defendant the purpose for which the oil delivered under the contract was to be used, and the plaintiff cannot recover under the third count of its declaration."

7. The court erred in refusing, over the objection and exception of the defendant, to give the following instruction requested by the defendant, namely,

"Where a person owes a duty to do an act by virtue of the obligation placed upon him by a valid contract, he has no right knowingly to do another act which will make it impossible for him to fulfill that obligation. To apply this to the case at bar, Frank L. Young Company, owing a duty to return the drums promptly, had no right by their intentional act to cause the drums to be placed in custodia legis, that is, under attachment, and to claim that they were therefore unable to so return them to McNeal-Edwards Company."

8. The court erred in refusing, over the objection and exception of the defendant, to give the following instruction requested by the defendant, namely,

"To so place them under attachment as described in the foregoing request, and to still retain them, constitutes a breach of the contract in suit, and your verdict must be for the defendant."

[fol. 84] 9. The court erred in admitting, over the objection and exception of the defendant, any and all evidence introduced by the plaintiff on the subject of the quality of the merchandise which was the subject of this controversy, as set forth in the defendant's bill of exceptions.

McNeal-Edwards Company, By its Attorney, Asa P. French. Clarence S. Towles, of Counsel.

Bond on appeal for $14,000, approved and filed January 31, 1929, omitted in printing.

[fol. 85] Citation, in usual form, showing service on Warner, Stackpole & Bradlee and M. B. Leach, Jr., omitted in printing.

[fol. 86] Clerk's certificate to foregoing transcript omitted in printing.

[Memorandum.—Orders of enlargement of time for docketing case to and including March 27, 1929, are here omitted. A. I. Charron, Clerk.]

[fols. 87 & 88] Minute entry of submission, October 8, 1929, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT

JUDGMENT—November 12, 1929

This cause came on to — heard on October 8, 1929, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel:

Upon consideration whereof, It is now, to wit, November 12, 1929, here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict set aside and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the appellant recovers costs of appeal.

By the Court.

Arthur I. Charron, Clerk.

[fol. 89] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1929

No. 2345

MCNEAL-EDWARDS COMPANY, Defendant, Appellant,

v.

FRANK L. YOUNG COMPANY, Plaintiff, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Anderson, and Wilson, JJ.

OPINION OF THE COURT—Filed November 12, 1929

ANDERSON, J.:

In January, 1922, the McNeal-Edwards Company, a Virginia corporation, contracted to sell to Frank L. Young Company, a Massachusetts corporation, 1107 drums of Prime "A" Crude Menhaden Fish Oil, for about $18,000, the contract providing that the purchaser should return the drums to the seller, freight prepaid. The oil was duly shipped and paid for in full in March, 1922. In September, 1922, the purchaser brought suit in the Massachusetts Superior Court, alleging breach of warranty of quality, and attached the drums, which it had not returned. The seller, in January, 1923, removed this suit to the Federal District Court, and counsel appeared specially in its behalf. This suit was subject to the provisions of G. L. Mass., chap. 227, sec. 1, that the attachment in such suit "shall be valid only [fol. 90] to secure the application of the property so attached to the satisfaction of the judgment."

In March, 1923, the seller brought an action, also in the District Court, against the buyer for the conversion of these drums, and its present counsel appeared in its behalf. On January 4, 1927, the purchaser brought a second suit in the Federal District Court against the seller, for the same cause of action as that contained in its first suit brought in September, 1922. It made service of the writ upon the counsel in the conversion suit, then pending in the same court and also again attached the same drums. On Febru-

ary 28, 1927, the buyer discontinued its first suit. The seller moved to abate the buyer's second suit, on the ground that the second suit was not a cross action within the fair meaning of G. L. Mass., chap, 227, secs. 2 and 3. These sections provide as follows:

"Section 2. If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other. * * *

"Section 3. The writ in such cross action may be served on the attorney of record for the plaintiff in the original action, and such service shall be as valid and effectual as if made on the party himself in the commonwealth."

This contention in substance is that the service upon the seller's attorney is not authorized under these sections; that the Federal District Court never acquired unrestricted jurisdiction,—not limited to the value of the attached drums. This motion was overruled and the seller duly excepted.

It is unnecessary for us to assume the duty of initial construction of these sections on the point now in question, for we are of opinion that the case may be disposed of on its merits without such decision. Clearly, the court below had jurisdiction to the extent of the value of the attached prop-
[fol. 91] erty, whether the service on the seller's attorney was or was not valid to give full jurisdiction. For present purposes, this is enough.

The cases went to trial together, with the result that in the suit for breach of warranty the jury found an alternative verdict for the Frank L. Young Company, for $10,730.17; in the conversion suit the jury found specially that the drums were worth $1,384; that the drums were, by the buyer, retained (before they were attached on September 15, 1922) an unreasonable time, and that the damage resulting to the McNeal-Edwards Company because of such unreasonable detention was $100. These findings in the conversion suit are made a part of the bill of exceptions in the other case.

The crucial question is that arising under the seller's contention that the purchaser was itself guilty of a breach of the contract, by its failure to return the drums, having a determined value of $1,384, within a reasonable time. When the buyer received this oil and found, as it claimed, that it was not of the quality called for by the contract, it might have refused to accept it. Instead of doing that, approximately six weeks later, it paid for the same in full, but "without prejudice" to its claims. Under the written contract, it was its duty, keeping the oil—good or bad—within reasonable time to empty the containers and return them to the seller. Assuming that defects in the oil (excessive viscidity) excused it from prompt performance of its duty during the cold weather when, as plaintiff claimed, the oil would not run from the containers, it plainly did not excuse it until the summer had nearly passed (September 15), when it attached the drums wrongfully retained by it until that time. The plaintiff-buyer then is in the position of suing on a contract which it had itself broken. This it cannot do. Whether the contract is to be construed under the law of Maryland or of Massachusetts, the result is the same. In both States the Uniform Sales Act is adopted; in both the peculiar doctrine of Britton v. Turner, 6 N. H. 481, is rejected. Maryland Code, Art. 83, chap. 1, sec. 22. Dougherty v. Gring, 89 Md. 535; Townes v. Cheney, 114 Md. 362; G. L. [fol. 92] Mass. c. 106, § 365; 3 Williston Contracts, sec. 1477 and cases cited.

The case falls within the doctrine of Sipley v. Stickney, 190 Mass. 43. In that case a suit was brought to recover for wages alleged to be due the defendant's farm manager. It appeared that the plaintiff had intentionally failed to act with the diligence, integrity and skill which his employment called for, particularly in that he had deceived his employer relative to the non-payment of bills run up by him as such manager. A verdict for the plaintiff was returned; but the Supreme Court held that "a wilful default in the performance of a stipulation not going to the essence of the contract bars recovery"; that "where the plaintiff has honestly tried to perform his contract, it is one thing to hold that it must have been the intention to make the commission of such a breach a condition precedent. But where the default is wilful the question in our opinion is a different one. Where a contractor commits a wilful default and yet claims

the contract price, he in effect claims that he has a right to break his contract. But he has no such right. 'The doctrine that a breach after part performance is not a defence unless it goes to the essence, does not give a party a right to commit a breach because it does not go to the essence; it merely excuses the breach to the extent just stated after it has been committed: Langdell, Summary of the Law of Contracts, sec. 168. In Metcalf on Contracts, pp. 7-9, the general doctrine is laid down that if the failure to perform the express contract be intentional, it is such bad faith that he can recover nothing'."

The only answer made by counsel for the appellee to this contention is that "No citation of authority is needed to the point that nothing but a substantial breach by one party is an excuse for non-performance by the defendant." No authorities are cited in support of this proposition, which plainly is not law in Massachusetts or in Maryland if the breach be wilful.

The alternative verdict reads as follows:

"The jury find for the plaintiff and assess damages in the sum of ten thousand seven hundred thirty and 17/100 dollars;

[fols. 93 & 94] But if, as a matter of law, the plaintiff is not entitled to a verdict, then the jury find for the defendant and consent that this alternative verdict may be entered on order of the United States District Court for the District of Massachusetts, or of the United States Circuit Court of Appeals for the First Circuit, or of the Supreme Court of the United States, with the same effect as if returned by them."

The result is that under this alternative verdict the defendant is entitled to judgment.

The judgment of the District Court is vacated, the verdict set aside and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellant recovers costs of appeal.

Thereafter, to wit, on December 23, 1929, within the time duly extended by the court, the following Petition for Rehearing was filed by the appellee:

[fol. 95] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

[Title omitted]

PETITION OF FRANK L. YOUNG COMPANY FOR REHEARING—Filed Dec. 23, 1929

Now comes Frank L. Young Company and says that on November 12, 1929, this Honorable Court (Bingham, Anderson, and Wilson, JJ.) vacated the judgment of the District Court for the District of Massachusetts, and remanded the case to the said Court for further proceedings not inconsistent with the opinion. Your petitioner further says that the action in the District Court was brought on behalf of the buyer of about eighteen thousand (18,000) dollars' worth of fish oil, to recover for breaches of warranty of the quality thereof; that the jury found for the plaintiff in the amount of $10,730.17. Your petitioner further says that the ground upon which this Honorable Court reversed the judgment of the District Court was that the plaintiff, by retaining in its possession until September 15, 1922, the defendant's drums in which the oil had been shipped, had committed an intentional breach of a provision of the contract of sale requiring return of the drums within a reasonable time.

[fol. 96] Your petitioner prays that this Honorable Court grant a rehearing of this case, and for cause thereof respectfully suggests that the Court committed error in its said opinion for the following reasons:

1. The Court has assumed that the breach, if any, of Frank L. Young Company in not returning the drums prior to September 15th was a wilful breach, whereas there was no evidence which would require the jury to find or permit the Court to instruct as matter of law that such breach, if any, was wilful or intentional.

2. There was no evidence before the jury upon which the jury could find that the breach by Frank L. Young Company in delaying the return of the drums to September 15th was wilful or intentional.

3. The jury's verdict in the case of McNeal-Edwards Company v. Frank L. Young Company could not be con-

sidered by this Court in arriving at a decision on the appeal in Frank L. Young Company v. McNeal-Edwards Company.

4. The jury's verdict in McNeal-Edwards Company v. Frank L. Young Company did not find that the breach by Frank L. Young Company of its obligation to return the drums was intentional.

5. By the law of Massachusetts referred to by the Court, a breach by the plaintiff not going to the essence of the contract will not bar recovery unless such breach was wilful and accompanied by bad faith.

6. By the general commercial law, which was binding upon the District Court under the decision of Swift v. Tyson, 16 Peters, 1, a breach by the plaintiff not going to the essence of the contract will not bar recovery, regardless of whether it was intentional.

7. There is no assignment of error based on, and nothing in the appellant's bill of exceptions dealing with, the alleged breach of appellee in failing to return the drums prior to September 15th.

[fols. 97 & 98] 8. No defense based upon failure of appellee to perform the contract is raised by the appellant's pleadings and no question relating to the failure to return the drums prior to September 15th was raised in the District Court either by pleading, motion for directed verdict, or appropriate request for ruling.

9. The Court could not authorize judgment for the defendant on the alternative verdict of the jury, under Article VII of the Amendments to the Constitution of the United States.

Frank L. Young Company, by Warner, Stackpole, Bradlee & Cabot, Its Attorneys.

Certificate

I, John G. Palfrey, of counsel for Frank L. Young Company, hereby certify that the above petition is presented in good faith, and not for purposes of delay, and that there are good and substantial grounds for the same in law and justice.

John G. Palfrey.

In United States Circuit Court of Appeals

Order Granting Rehearing—January 22, 1930

Upon petition of appellee, It is ordered that a rehearing in this case be, and the same hereby is, granted, and the case is assigned for reargument at the April session, 1930.

By the Court.

Arthur I. Charron, Clerk.

[fols. 99 & 100] Minute entry of submission on reargument omitted in printing.

In United States Circuit Court of Appeals

Order Modifying Judgment—July 1, 1930

It is ordered that the judgment entered November 12, 1929, be, and the same hereby is, modified to read as follows:

The judgment of the District Court is vacated, the verdict is set aside, and the case dismissed for want of jurisdiction, but without prejudice. No costs.

By the Court.

Arthur I. Charron, Clerk.

[fol. 101] In United States Circuit Court of Appeals for the First Circuit, October Term, 1929

No. 2345

McNeal-Edwards Company, Defendant, Appellant,

v.

Frank L. Young Company, Plaintiff, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Anderson and Wilson, JJ.

Opinion on Rehearing—Filed July 1, 1930

January 5, 1922, the defendant, the McNeal-Edwards Company, a Virginia corporation, having no place of busi-

ness in Massachusetts, entered into a contract in Baltimore, Maryland, with the plaintiff, Frank L. Young Company, a Massachusetts corporation, wherein the defendant agreed to sell and the plaintiff agreed to buy by description 1,107 drums of Prime "A" Crude Menhaden Fish Oil at $.33 per gallon (about $18,000) in seller's drums f. o. b. Baltimore. The contract also provided that the purchaser should return the drums to the seller, freight prepaid. The oil was duly shipped and paid for in full in March, 1922. In September, 1922, the Frank L. Young Company brought suit in Massachusetts Superior Court alleging breach of warranty of quality, and attached the drums, which it had not returned. The McNeal-Edwards Company, on January 2, 1923, removed the suit to the Federal District Court for Massachusetts, counsel appearing specially for that pur-
[fol. 102] pose. In that suit the only service of process was the attachment of the drums.

In March, 1923, the McNeal-Edwards Company brought an action in the Federal District Court for Massachusetts against the Young Company for damages and conversion of the drums, and Asa P. French appeared as counsel for the plaintiff in that action.

January 4, 1927, the Young Company brought a suit in the same Federal District Court against the McNeal-Edwards Company for the same cause of action as that contained in its first suit of September, 1922.

In this writ of January 4 it was set out that the McNeal-Edwards Company was a Virginia corporation and a citizen and resident of that State, "having its usual place of business at Readville therein; which corporation cannot be found to be served with process; which corporation has brought an action, wherein Asa P. French is attorney of record for the plaintiff, in the District Court for our District of Massachusetts; in which action the demands are of such a nature that the judgment or execution therein may be set off against the judgment or execution herein."

The writ was made returnable on the third Tuesday of March, 1927, and directed the marshal to attach the goods of the defendant and summons it "by serving this writ on Asa P. French who has a usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts, as said French is attorney of Record as aforesaid." The marshal's return on the writ shows that on January 5,

1927, he served the writ by chip attachment and summoned the defendant "by giving in hand to Asa P. French, attorney of record of said McNeal-Edwards Company, at Boston, in said District, copy of an original summons of this writ."

On February 23, 1927, the Young Company having obtained an order from the District Court for a special precept of attachment in the action brought January 4, 1927, the special precept was issued; and the officer's return on the special precept shows that on February 25, 1927 he attached 1,100 steel drums as the property of the defendant and, on the following day, summoned the defendant by giving in hand a copy of the precept to Asa P. French, attor- [fol. 103] ney of record, etc. The drums having been attached on the special precept on February 25th, the Young Company, on February 28, 1927, and before the term of court at which the writ of January 4, 1927 was returnable, caused its suit of September, 1922 to be discontinued.

On March 22, 1927, the writ of January 4, 1927, was entered late by leave of court; and on March 23, Asa P. French filed a special appearance for the McNeal-Edwards Company; and on the following day, "without waiving its special appearance, but relying thereon, and without submitting itself to the jurisdiction of the court," it filed a plea in abatement and a motion to dismiss the action.

In the motion to dismiss it was alleged that "the defendant is not a citizen or resident of the Commonwealth of Massachusetts, but was at the time of the beginning of this suit, and is, a citizen and resident of the Commonwealth of Virginia, and that no valid service has been made upon the defendant, as appears upon the face of the writ and the declaration in said action, and as disclosed by the records of this court" in the first suit brought by the Young Company against McNeal-Edwards Company and in the suit of McNeal-Edwards Company against the Young Company.

In the plea in abatement, after setting out that on the bringing of the action of January 4, 1927, there was pending in this court another suit between the same parties for the same cause of action, which was discontinued without notice to this defendant on February 28, 1927, it was alleged, among other things, that the defendant was "a corporate citizen and resident of Virginia, having no place of business in Massachusetts." It then set out the contract, the bringing of the first suit by the Young Company against

the defendant, that jurisdiction in that suit was predicated solely upon the attachment made of the drums, its removal to the District Court, the action brought by the McNeal-Edwards Company against the Young Company, and the bringing of the second action by the Young Company against it for the same cause of action as that alleged in the first suit, without first having discontinued the first suit, and that the process in the suit of January 4 was [fol. 104] served upon the attorney of record in the action brought by the Young Company; and alleged: (1) "That such service, under the circumstances heretofore alleged, cannot operate to give the plaintiff the right to satisfy a judgment, if any, against any property of the defendant except said containers, but for the presence of which in Massachusetts it would have been obliged to bring its original action in Virginia"; and (2) that "the service attempted to be made upon it in this case is void and of no effect, for the reason that a party bringing suit against a non-resident in a state court, and then claiming jurisdiction upon the sole ground that the defendant in such suit has property in this commonwealth which can be attached, cannot, if the suit is removed to the Federal Court, and a cross-action is instituted there, bring another suit, with [by] or without discontinuing the original suit, for the same cause of action, and thereby vest unrestricted jurisdiction in the Federal Court, by serving process therein upon the attorney for the plaintiff in such cross-action."

The plaintiff filed a replication. In it it did not deny that the defendant was "a corporate citizen and resident of Virginia, having no place of business in Massachusetts", as alleged in the plea, or question the allegation in its own writ that the defendant was a citizen and resident of Virginia and "cannot be found to be served with process" in Massachusetts, and which the return of the sheriff on the writ in its first suit also showed; and after admitting "that no personal jurisdiction was obtained over the defendant in that action [the first action] and that no judgment could have been given in that action" that could have been satisfied, except out of the property attached, it alleged the bringing of the action of the McNeal-Edwards Company against the Young Company and that "for the purpose of curing the defect of personal jurisdiction in the plaintiff's former action * * * the present action was brought and personal jurisdiction obtained by service on the attorney

of record in the McNeal-Edwards Company's said action under Gen. Laws of Massachusetts, Chapter 227, Sections 2 and 3, and Rule 53 of this court."

The motion to dismiss having been denied and the plea [fol. 105] overruled, "without waiving its motion to dismiss and its plea in abatement," the McNeal-Edwards Company filed an answer in which it denied each and every allegation in the plaintiff's writ and declaration and set up three special matters of defense.

The case was tried before a jury. The jury found a verdict for the plaintiff and assessed its damages in the sum of $10,730.17. And at the direction of the court, it rendered an alternative verdict to the effect that "if, as a matter of law, the plaintiff is not entitled to a verdict, then the jury find for the defendant, etc." It also made special findings to the effect: (1) that the oil delivered by the McNeal-Edwards Company to the Young Company was not of the quality and grade called for by the contract sued upon; and (2) that the amount of the damages sustained by the Young Company by reason of the inferiority in the quality and grade of the oil delivered was $10,730.17.

After the verdict was rendered, the defendant "appearing specially" filed a motion in arrest of judgment on the grounds that it appears upon the record: (1) that this court had never acquired jurisdiction of this defendant; (2) that the service made upon the defendant's attorney was void and of no effect; and (3) that "the District of Massachusetts is not the proper venue for hearing and determining said cause." This motion was also denied, subject to exception, and judgment was entered for the plaintiff.

The first three errors assigned relate to the denial of the defendant's motion to dismiss, the denial of its motion in arrest of judgment; and the overruling of its plea in abatement.

The other assignments of error relate to the merits of the case and the matters complained of occurred during the course of the trial.

[fol. 106] Opinion of the Court on Rehearing

BINGHAM, J.:

The questions raised by the first three assignments of error are whether the District Court acquired jurisdiction

either by the service of process upon Mr. French, the attorney of record of the McNeal-Edwards Company, in the suit brought by it against the Young Company, or by the supplementary attachment, or by the defendant, the McNeal-Edwards Company, having in this suit voluntarily submitted itself to the jurisdiction of the court.

It is not, and could not well be, contended that the defendant voluntarily submitted itself to the jurisdiction of the court. The record discloses that from the very inception to the close of the case the defendant appeared specially, reserving its right to question the jurisdiction of the court. So the questions, on this branch of the case, are whether jurisdiction over the suit was acquired by the supplementary attachment of defendant's property in the state, or over the defendant personally by serving process upon Mr. French under the circumstances herein disclosed.

Although the plaintiff's suit of January 4 against the McNeal-Edwards Company, a Virginia corporation, was brought in the Federal District Court, it contends and, in order to support the jurisdiction of the District Court, must contend that the provisions of Section 1, 2, 3 and 4 of Chapter 227, Gen. Laws Mass., hereafter quoted, are applicable to a suit brought in that court and obligatory upon it. Arkwright Mills v. Aultman & Taylor Co., 128 Fed. 195.

Section 8 of Chap. 181, Gen. Laws Mass., provides:

"Section 8. Foreign corporations having property in this commonwealth shall be liable to be sued and to have their property attached in the same manner and to the same extent as individuals who are residents of other states and who have property in this commonwealth. The service of the writ shall be made in the manner provided in chapters two hundred and twenty-three and two hundred and twenty-seven, with such further service as the court to which the writ is returnable orders."

[fol. 107] It is not contended and could not be that the service of the writ in this case was had under the provisions of Chap. 223. The service had purported to be under the provisions of Chap. 227, which reads as follows:

"Section 1. A personal action shall not be maintained against a person not an inhabitant of the commonwealth

unless he or his agent appointed under section five has been served with process in the commonwealth, or unless an effectual attachment of his property within the commonwealth has been made upon the original writ, and in case of such attachment without such service, the judgment shall be valid only to secure the application of the property so attached to the satisfaction of the judgment.

"Section 2. If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other. If there are several defendants in the original action, each of them may bring such cross action against the original plaintiff and may be allowed to set off his judgment against that which may be recovered against him and his co-defendants in like manner as if the latter judgment had been against him alone.

"Section 3. The writ in such cross action may be served on the attorney of record for the plaintiff in the original action, and such service shall be as valid and effectual as if made on the party himself in the commonwealth.

"Section 4. The court in which either of the actions is pending may order continuances to enable the absent party to defend the action brought against him, and to enable either party to set off his judgment or execution against that which is recovered against him, but the actions shall not be unreasonably delayed by the neglect or default of either party. The provisions of the following sections, relative to actions against persons absent from the commonwealth, shall not apply to a cross-action brought under the two preceding sections.

"Section 5. Every individual not an inhabitant of the commonwealth and every partnership composed of persons [fol. 108] not such inhabitants, having a usual place of business in the commonwealth, temporarily or permanently, or engaged here, temporarily or permanently, and with or without a usual place of business here, in the construction, erection, alteration, or repair of a building,

bridge, railroad, railway, or structure of any kind, shall, before doing business in the commonwealth, appoint in writing a person who is a citizen and resident thereof to be his or its true and lawful attorney upon whom all lawful processes against such individual or partnership may be served with like effect as if served on such person or partnership. The power of attorney shall be filed in the office of the state secretary, and copies certified by him shall be taken as sufficient evidence thereof, etc."

The service provided for in Sec. 5 is not applicable in this suit for the action was brought under Secs. 2, 3 and 4, and Sec. 4 expressly provides that in such case the mode of service authorized by Sec. 5 shall not apply.

It has been held by the Massachusetts court that, by force of Sec. 8, c. 181, above set out, a non-resident corporation may be sued and have its property attached in the manner provided in Sec. 1 of c. 227, but that where such corporation is not personally served with process and only a nominal, not "an effectual attachment," has been made "upon the original writ," that a supplementary attachment, subsequently had on special process, is not an attachment on the original writ and is invalid. Roberts v. Anheuser Busch Br. Ass., 215 Mass. 341, 102 N. E. 316. And it has also been held by the Supreme Court of the United States that neither under Sec. 915, Rev. Stat., nor under any provision of the Act of March 3, 1887, as amended August 13, 1888, can a supplementary attachment be had in a Federal District Court where no personal service can be had upon the defendant and where there was no personal appearance; that "an attachment is still but an incident to a suit, and that, unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a Federal Court," as "attachment * * * [is] not a means of acquiring jurisdiction" on process issued out of a Federal Court, whether the attachment is made on the original or a supplementary process. Big Vein Coal Co. v. Read, 229 U. S. 31, 37, 38.

[fol. 109] It is, however, held that if property is attached on a writ issued out of a state court and the statutes of the state authorized the attachment, that upon removal of the cause to the Federal Court, jurisdiction over the property will be retained, notwithstanding the attachment would not

confer jurisdiction had it been made on a writ issued out of the Federal Court and no personal service had been obtained. Clark v. Wells, 203 U. S. 164; St. Louis, B. & M. Ry. v. Taylor, 266 U. S. 200, 208, 209.

As there was "no effectual attachment" of the defendant's property in the District of Massachusetts upon the "original writ" brought by the plaintiff (January 4, 1927) in this case, it follows that the supplementary attachment was invalid and would not confer jurisdictton the District Court under section 1; or under the Federal rule, unless jurisdiction over the defendant was obtained; and that the position taken by this court in its opinion in this case of November 12, 1929,—that the District Court "had jurisdiction to the extent of the value of the attached property, whether the service on the seller's attorney was or was not valid" to give jurisdiction over the person of the defendant, and therefore this court had jurisdiction to determine the merits of the case, without deciding whether the District Court acquired jurisdiction over the defendant,—was clearly wrong,

As to the question whether the defendant, a non-resident corporation, was present doing business in the District of Massachusetts so that personal service of process was or could be had upon it there, the following facts appeared.

The contract for the sale of the goods in question was made in Baltimore, Maryland, through a broker acting for both parties, and was to be performed and was performed there by the delivery of the goods f. o. b. Baltimore. It is evident from these facts that the sale was not made and that the right of action did not accrue in Massachusetts, but in Maryland, and the return of the sheriff on the writ in the removal suit brought by the plaintiff in the Massachusetts court against the defendant (now discontinued) shows that when the officer in September, 1922 attempted to make personal service of the writ he was unable to do [fol. 110] so for the reason that the defendant was not doing business through any officer or agent in Massachusetts.

The facts alleged in the writ in this case of January 4, 1927, are that the defendant was a Virginia corporation and a citizen and resident of that State, having its usual place of business at Readville therein, which corporation cannot be found to be served with process. And the de-

fendant's plea in abatement alleged that it was a corporate citizen and resident of Virginia, having no place of business in Massachusetts, which facts the plaintiff admitted by not denying them in its replication. It thus unquestionably appears that the defendant is a Virginia corporation, having its usual place of business there, and no place of business in Massachusetts. Also that "it cannot be found" in Massachusetts, that is, that it is not and was not present there, by its officers or agents, carrying on its business (People's Tobacco Co. v. Am. Tobacco Co., 246 U. S. 79); and this being so, it is evident that personal service of the writ on the non-resident corporation was not and could not be had upon it in the District of Massachusetts. It has been held over and over again that personal service on a non-resident corporation cannot be had in the District of the State where suit is brought, unless it is carrying on business there of such character and extent as would warrant the inference that it is present there by its officers authorized to receive service. St. Louis S. W. R. Co. v. Alexander, 227 U. S. 218, 226, 227; Philadelphia & Reading Railway Co. v. McKibbin, 243 U. S. 264, 265; Green v. C., B. & Q. Ry. Co., 205 U. S. 530; People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79; Rosenberg Bros. & Co., Inc. v. Curtis Brown Co., 260 U. S. 516; Bank of America v. Whitney Bank, 261 U. S. 171; Cannon Mfg. Co. v. Cudahy Co., 267 U. S. 333; James-Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359.

It has also been held that the doing of a single business transaction or even four separate disconnected transactions by a non-resident corporation in the State or District of suit would not warrant it being found present there through its officers or agents so that personal service could [fol. 111] be had upon it. Rosenberg Bros. & Co., Inc. v. Curtis Brown Co., 260 U. S. 516; Hunter v. Mutual Reserve Life Insurance Co., 218 U. S. 573; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727. See also Kirven v. Virginia-Carolina Chemical Co., 145 Fed. 288; Delaware & H. Canal Co. v. Mahlenbrock, 63 N. J. L. 281, 43 Atl. 978; Penn Collieries Co. v. McKeever, 183 N. Y. 98; Booth v. Weigand, 30 Utah 135, 83 Pac. 734; 12 R. C. L. s. 48.

Although the defendant corporation was not present doing business in the District of Massachusetts at the time

this suit of January 4, 1927 was brought, the contention is made that the District Court acquired jurisdiction over the defendant and the cause of action by virtue of the service that was had upon the defendant's attorney of record, pursuant to the provisions of Secs. 2 and 3 of c. 227 of the Gen. Laws of Massachusetts; that under the provisions of those sections the Massachusetts courts have upheld the service there authorized on the theory that a non-resident by bringing suit in a Massachusetts court assents to its attorney receiving service in any suit or suits which a defendant or defendants in the original suit should see fit to bring against it (Aldrich v. Blatchford, 175 Mass. 369, 371); and that the service being held valid as to process issuing out of the state court, it should be held valid and enforced under the Conformity Act, Rev. Stats. s. 914, as to process issuing out of a federal court in the District of Massachusetts.

It is well settled that a question of this character (the acquisition of jurisdiction over a defendant by the service of process) involves the jurisdiction of the court as a Federal Court, which jurisdiction cannot be enlarged or abridged by any statute of a state or the decisions of its courts; and that this is true notwithstanding the so-called Conformity Act, Rev. Stats. s. 914. See Mexican Central R. R. v. Pinkney, 149 U. S. 194, 208, 209; Southern Pac. v. Denton, 146 U. S. 202; Goldey v. Morning News, 156 U. S. 518; Wabash Western Railway v. Brow, 164 U. S. 271, 276; Mechanical Appliance Co. v. Castleman, 215 U. S. 437; Western Loan & Savings Co. v. Butte & Boston Mining Co., 210 U. S. 368; Davidson Marble Co. v. Gibson, 213 U. S. [fol. 112] 10, 18, 19; Davis v. C. C. C. & St. L. Ry., 217 U. S. 157, 174; Western Indemnity Co. v. Rupp, 235 U. S. 261. In other words, the service of process authorized by the Statute of Massachusetts (Secs. 2, 3 and 4, c. 227), as construed and upheld by its courts, is not binding upon and will not be enforced in a federal court, if to do so would enlarge or abridge its jurisdiction, and this question of jurisdiction, the ultimate determination of which is for the Supreme Court (Mechanical Appliance Co. v. Castleman, supra), is subject to review in this court, the whole case being before us on appeal. American Electric Welding Co. v. Lalance & Grosjean Mfg. Co., 249 Fed. 968; In re N. Y. etc. Steamship Co., 155 U. S. 531; United States v.

Jahn, 155 U. S. 109. See also 213 Stat. L. 926, c. 229 & 128.

We know of no case where suit was brought in a federal court and constructive service of process, as authorized by a statute of a state and the decisions of its courts, was had, that the jurisdiction of the court over the cause has been upheld in the appellate courts in the absence of a waiver of personal service. And the same is true if the suit was brought in a state court and seasonably removed to the federal court.

In So. Pac. Co. v. Denton, supra, the plaintiff Denton was a citizen of Texas and resided in the Eastern District thereof. The defendant was a Kentucky corporation doing business and having an agent in the Western District of Texas. The suit was brought in the federal court for the Western District of Texas. The defendant appeared specially and objected to the jurisdiction of the court. Under the Federal Statutes the suit could have been brought either in the Eastern District of Texas or in the District of Kentucky, and although the suit was brought in the wrong district (a question of venue) the defendant by appearing generally would waive the objection to the jurisdiction of the court on that score. A statute of Texas as construed by its courts (Texas Laws 1887, c. 128) made an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from the jurisdiction by reason of non-residence. The lower federal court held that the non-resident defendant, by appearing specially and ob- [fol. 113] jecting to the jurisdiction, consented that its special appearance should be treated as general and a waiver of its objection to the jurisdiction of the court. But when the case came before the Supreme Court it reversed the decision of the court below and refused to apply and enforce the statute of Texas, as construed by its courts.

In Mexican Central Railway v. Pinkney, supra, the plaintiff Pinckney was a citizen and resident of the Western District of Texas. The defendant was a Massachusetts corporation, with its principal place of business in Boston. It owned and operated a line of railroad and did business in the Western District of Texas. Service was had upon one Lawton, as its local agent in that district. Lawton was not the local agent of the defendant upon whom service could be had. The defendant appeared specially and filed a plea

in abatement, setting out that Lawton was not its local agent. The plaintiff demurred to the plea and the lower federal courts sustained the demurrer: In the Supreme Court the service was held bad on the ground that Lawton was not the defendant's local agent. It also held that the defendant's special appearance for the purpose of excepting to the service and, after its plea was overruled, its filing a general answer, could not be deemed a general appearance; that to apply and enforce the statute of Texas in the federal court would be to contravene the Acts of Congress manifesting an intention "not to leave the jurisdiction of the inferior federal courts to the regulation and control of state legislation"; also that state legislation limiting the power of review given appellate courts by the Acts of Congress, over the judgments of their lower courts, involving a question concerning the jurisdiction of the courts, would not be enforced.

In Goldey v. Morning News, supra, the plaintiff brought her action in one of the State Courts of New York against the defendant, a Connecticut corporation, having no place of business and doing no business in the State of New York. Service was had under a statute of the state (see 22 Fed. 635, 636) by serving the summons in New York upon the president of the corporation, temporarily there, who was a resident and citizen of Connecticut. No attachment of property was had. The defendant appeared specially for [fol. 114] the purpose of presenting a petition for removal to the Federal Court, and the action was removed into the Circuit Court for the Eastern District of New York. In the Circuit Court the defendant, appearing specially, filed a motion, supported by affidavits to the above facts, to set aside the service. The Circuit Court set aside the service, declared it null and void, and the plaintiff sued out a writ of error. In the Supreme Court it was held: (1) "that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service"; that "whatever effect a constructive service may be allowed in the courts of the same Government, it cannot be recognized as valid by the courts of any other Government"; (2) that

"the principle which governs the effect of judgments of one state in the courts of another state is equally applicable in the Circuit Courts of the United States, although sitting in the state in which the judgment is rendered"; (3) that "service of mesne process from a court of a state, not made upon the defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Courts of the United States, after the removal of the case into that court, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect of service, and to have submitted himself to the jurisdiction of the court"; (4) that the defendant by appearing specially and filing its petition for removal did not waive the defects in the service of the summons; that to so hold "would be inconsistent with the terms, as well as with the spirit, of the existing Acts of Congress regulating removals"; (5) that "the jurisdiction of the Federal Courts depends upon the acts passed by Congress pursuant to the powers conferred upon it by the Constitution of the United States and cannot be enlarged or abridged by any statute of a state"; that "one great object in the establishment of the courts of [fol. 115] the United States and regulating their jurisdiction was to have a tribunal in each state * * * to which all who were non-residents or aliens might resort for legal redress"; and (6) that the Conformity Act (Rev. Stats. s. 914), requiring the practice in the Federal Courts to conform, as near as may be, to that "existing at the time in the courts of the state in which it is held, applies only to cases of which the court has jurisdiction according to the Constitution and laws of the United States."

This case undoubtedly decides that a non-resident person or corporation may resort to the federal courts other than that of his or its residence and there litigate his controversies with a citizen or citizens there residing untrammelled by state legislation authorizing constructive service of process, which, if given effect, would abridge or enlarge the jurisdiction of the Federal Court.

In Mechanical Appliance Co. v. Castleman, supra, the action was brought in a state court of Missouri against a non-resident corporation and removed to the Federal Court for the Eastern District of Missouri on the ground of di-

verse citizenship. In the Federal Court a plea to the jurisdiction was filed. The return of service by the sheriff of the summons issued out of the state court appeared to be valid on its face. The plea to the jurisdiction, and the affidavits filed in its support, disclosed that the corporation was not doing business in the State of Missouri at the time of the service of summons, and that the person served with the process was not the agent of the defendant at the time. In the Circuit Court the plea to the jurisdiction was overruled on the ground that the facts stated in the return of the sheriff upon the summons were conclusive and could not be controverted by the defendant. In making this ruling the court followed the law of Missouri, as held by its highest court, that in a case of this kind a return of this character is conclusive upon the parties. In the Supreme Court it was held that the return of the sheriff "was not conclusive upon the question of service"; "that a foreign corporation can be served with process within the state only when it is doing business therein, and that such service must be upon an agent who represents the corporation in [fol. 116] its business"; that "in cases which concern the jurisdiction of the Federal Courts, notwithstanding the so-called Conformity Act, Rev. Stats. s. 914, neither the statutes of the state nor the decisions of its courts are conclusive upon the Federal Courts". And having reached this conclusion it reversed the judgment of the lower court and directed that the case be dismissed for want of jurisdiction.

In Wabash Western Railway Co. v. Brow, supra, after removal to the Federal Court, the defendant, a non-resident corporation, filed a plea to the jurisdiction on the ground that personal service had not been had upon it in the state court, which was overruled. The facts were that the corporation was neither incorporated, nor did business, nor had any agent in the state in which the suit was brought. The lower courts held that the defendant by filing its petition for removal in the state court, without specifying that it appeared specially for that purpose, waived its right to object to the service of process upon it after the removal of the case into the Federal Court. But the Supreme Court held that this was not so; that the defendant had a statutory right to remove the case; and that "an acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right"; and that to decide

otherwise "would be to place a limitation upon the jurisdiction of the Circuit Court, which is wholly inconsistent with the act" (the removal statute).

In Davidson Marble Co. v. Gibson, supra, the action was brought in the Federal Court for the Northern District of California. The United States was the real party plaintiff and three citizens and residents of the State of Illinois were defendants; and under the Act of Congress regulating such matters the action was required to be brought in the District Court whereof the defendants were inhabitants. As none of the defendants lived in the Northern District of California the court below was without jurisdiction. But although the defendants appeared specially and objected to the jurisdiction, the lower court held that their objection to the jurisdiction had been waived, basing its decision on Rule 22 of that court, which provided: "Any party may, without leave of court, appear specially in any action at [fol. 117] law or suit in equity for any purpose for which leave to appear could be granted by the court, by stating in the paper which he serves and files that the appearance is special and that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court, he will appear generally in the case within the time allowed therefor by law, or by the order of court or by stipulation of the parties. If such statement be not made as above provided, the appearance shall be deemed and treated as a general appearance."

In the defendants' special appearance and objection to the jurisdiction, they did not state that "if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court, they will appear generally in the case." In the Supreme Court, it was held that "the rule, as construed and applied in this case, is inconsistent with the laws of the United States, and therefore invalid. Rev. Stat. s. 918. A party who is sued in the wrong district, and does not waive the objection, may of right appear specially and object to the jurisdiction of the court, and the decision being against his objection, may of right bring the question directly to this court. The rule substantially impairs his right to appeal to this court, a right which is conferred by statute. 26 Stat. 826, c. 517, March 3, 1891. It says to him, you may appear specially and object to the jurisdiction, only upon the condition that

you will abide by the decision of a single judge; if that is against you, you must waive your objection and enter a general appearance; if you do not agree to do this, your special appearance will be deemed to be general. We think it was beyond the power of the Circuit Court to make and enforce a rule which imposes upon defendants such conditions, and transforms an objection to the jurisdiction into a waiver of the objection itself. The jurisdiction of the Circuit Court is fixed by statute. In certain cases a defendant may waive an objection to the jurisdiction over his person. But he cannot be compelled to waive the objection if he chooses seasonably to insist upon it, and any rule of court which seeks to compel a waiver is unauthorized by law and invalid." Having reached this conclusion it [fol. 118] reversed the judgment and directed a dismissal of the action for want of jurisdiction.

This case and those previously cited and reviewed disclose that a non-resident corporation is given by the Acts of Congress (1) the right to resort to a federal court, other than that of its residence, to litigate its controversies with citizens there residing; (2) the right, when sued in a state court, to remove the case to the federal court; (3) the right, when sued in a federal court, or in a removal case, to appear specially and object to the jurisdiction of the court (as to district of suit or service of process), and, its objection being overruled, the right to have the question reviewed by the proper federal appellate court. That a rule of court, statute of a state, or decision of its court, abridging and limiting any of these rights, will not be upheld and enforced in a federal court; and that this is particularly true as to a rule of court or statute of a state which undertakes to compel a non-resident to submit to the jurisdiction of the court, because of its having taken such action as the law affords in the enforcement of such a right. As said in the Wabash Railway case, supra, "an acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right".

But while the right of a non-resident defendant to appear specially, in a suit brought in or removed to a federal court, and object to its jurisdiction for want of proper service, is upheld in the federal courts, notwithstanding the existence of a statute of a state, or rule of the federal court, making such appearance a waiver of the objection,

it was held in York v. Texas, 137 U. S. 15, 17, 20, that a state might by a statute or the decisions of its courts, establish such a rule of practice within its jurisdiction, and that its enforcement there would not be a violation of the "due process" clause of the Fourteenth Amendment, as that clause did not affect or control the power of the state court to render judgment. It would seem, however, that the York case was overruled in Riverside Mills v. Menefee, 237 U. S. 189, 193, 194, 195, for there it was held that the assumption of jurisdiction by the state court and its rendering judgment against a non-resident corporation, [fol. 119] doing no business in the state and having no qualified agent therein upon whom service may be made, was a violation of the due process clause of the Fourteenth Amendment "since the very act of fixing by judicial action without a hearing a sum due, even though the method of execution be left open, would be in and of itself a manifestation of power repugnant to the due process clause."

The statute of Massachusetts (c. 227, ss. 2, 3, 4), if upheld and enforced in the federal court for the District of Massachusetts, would contravene the Acts of Congress in two important particulars. First, it would abridge the right given a non-resident to sue in that court by making the exercise of the right conditional upon its waiving personal service of process upon it, in case any citizen or citizens of Massachusetts, made defendants in its suit, should conclude to bring independent actions against it. And second, it would enlarge the jurisdiction of the federal court in the District of Massachusetts, as to suits brought against the non-resident by doing away with the requirement of personal service of process and substituting in its place the constructive service provided for in the State statute. For these reasons we think the statute of Massachusetts cannot be upheld and enforced in the District Court for Massachusetts, whether its enforcement would or would not contravene the due process clause of the Fourteenth Amendment, which the Supreme Court in Riverside Mills v. Menefee, supra, its latest decision on the question, held that it would.

It is, however, further contended that the constructive service had in this case upon the attorney of record for the defendant was adequate, on the theory that the plaintiff's suit with reference to that of the defendant was a set-off or in the nature of a set-off. Set-off, as generally under-

stood, and as provided for in the statutes of Massachusetts (Gen. Laws, c. 232), is a plea or defense filed in the action in which it is pleaded, and not an independent suit. It concerns mutual demands and the demand set up in the plea must be "liquidated or capable of liquidation by calculation"; and the respective demands being determined, a single judgment is entered for the party to whom a bal- [fol. 120] ance is due. No writ is issued, no service of process is required, no attachment of property is permitted, as would be in the bringing of an independent suit, for it is a plea in defense.

But under the provisions of Secs. 1, 2, 3 and 4 of Chap. 227, all the requisites of an independent suit are present, for the issuance of a writ and service of the process are required, and an attachment of property thereon is authorized. Section 4 likewise shows that the cross-action or cross-actions authorized by Sec. 3 are independent suits, for if a single suit is brought the writ may be made returnable in a different court of the State from that in which the suit of the non-resident was brought; or in case of two or more so-called cross-actions, they may be brought in as many different courts of the State as there are courts in which jurisdiction may be had.

Furthermore, had the suit of the McNeal-Edwards Company, the non-resident, been on a joint obligation against three defendants, and each of the three had separate demands against the non-resident, each defendant could have maintained separate independent suits against the non-resident, and each could have had his separate judgment off-set against the joint judgment of the non-resident against them, for the last clause in Sec. 2 provides:

"If there are several defendants in the original action, each of them may bring such cross-action against the original plaintiff and may be allowed to set-off his judgment against that which may be recovered against him and his co-defendants in like manner as if the latter judgment had been against him alone."

This provision of Sec. 2 discriminates against a non-resident in that it allows residents of the State to off-set judgments obtained against him, which its other statutes forbid, as between judgment creditors regularly served with

process. See Gen. Laws, Mass. c. 235, S. 27 (4), where it provides:

"Executions between the parties may, if required by either party, be set-off one against the other * * * but such set-off shall not be allowed * * *.

Fourth. If there are several debtors in one execution, to a part of whom only the amount due on the other is due."

We do not think that the jurisdiction of the Federal [fol. 121] Court over the person of a non-resident defendant can be thus enlarged or abridged by a statute of a state; that a state statute such as this authorizing the bringing of an independent suit or suits against a non-resident corporation, asserting jurisdiction over it, though not present doing business through its officers within the state and district of suit, cannot be sanctioned or justified under the law of set-off, or as a legitimate extension of it. That the steps the statute purports to authorize are those required in bringing an independent suit or suits, viz., the issuance of an independent writ or writs, the service of the process, the attachment of property thereon, and the rendition of distinct judgments, none of which are essential to the law of set-off. That in the Federal Court personal service of process, upon a non-resident corporation, in the absence of waiver, is essential to its jurisdiction; and that the statutory service here relied upon is but an attempt to assert personal jurisdiction where none in fact exists, and will not be recognized.

Sections 2, 3 and 4 of Chap. 227 are clothed in the same language as when first enacted in 1823. Section 1 has been amended. That section as originally drafted, and for many years thereafter (Gen. Sts. Mass., 1860, c. 126; Eliot v. McCormick (1887), 144 Mass. 10, 12), either alone or in connection with other statutes, authorized a personal judgment against a non-resident defendant who had previously been an inhabitant of the state, by bringing an action against him and leaving the summons at his last place of abode in the state. But in the case above cited (144 Mass. 10, 12), rendered after the decision of Pennoyer v. Neff, 95 U. S. 714, the Massachusetts court uprooted such service. That species of service and the one authorized by Sections 2, 3 and 4 of c. 227 involve the same mental conception and are off the same piece of cloth.

The result is that our former order in this case must be modified and as modified will read:

The judgment of the District Court is vacated, the verdict is set aside, and the case dismissed for want of jurisdiction, but without prejudice. No costs.

Anderson, J., dissents.

[fol. 122] In United States Circuit Court of Appeals for the First Circuit

[Title omitted]

Dissenting Opinion—Filed September 16, 1930, as of July 1, 1930

Anderson, J. (dissenting):

I am unable to agree that there was no jurisdiction under G. L. Mass. c. 227, § § 2 and 3. Service on the attorney of the McNeal-Edwards Company in a suit where, admittedly, the executions could be set off against each other, seems to me a valid service. The present decision is entirely inconsistent with the well-considered opinion of District Judge Francis Lowell in Arkwright Mills v. Aultman & Taylor Co., 128 Fed. 195, a decision in 1904. The same case was before this court on the merits in 145 Fed. 783.

In Huntington Mfg. Co. v. Bradford Worsted Spinning Co., in a decision by Circuit Judge Dodge, in 1925, now reported in 37 Fed. (2) 730, the same ruling was made. The [fol. 123] only contention there was, that because the attorneys on whom the service was made were not directly employed by the defendant corporation, but by its assignees for the benefit of creditors, the service was invalid. But Judge Dodge found this distinction of no avail.

Jurisdiction by service under this statute has been the general and well-recognized rule in this District from time immemorial. Probably a careful search of the files of the District Court would disclose many other cases in which the jurisdiction was thus grounded, and unquestioned by any counsel or by the court.

That the statute is constitutional was held by Chief Justice Holmes in Aldrich v. Blatchford, 175 Mass., 369, a decision in 1900.

I know of no reason to suppose that Mr. Justice Holmes and his present associates on the Supreme Court of the United States do not now hold the same views which he then so cogently expressed. The gist of the decision is found in the sentence reading, "The foreign company by employing an attorney to begin an action against the defendant in Massachusetts, thereby assents to the attorney's receiving service in a counter suit, and gives him such powers as make the service sufficient."

The doctrine thus stated seems to me to be irrefutable. If such service was good in the Massachusetts courts, under the Conformity Act (R. S. s. 914), it was good in the Federal court. It follows that, both on principle and on authority, service on the attorney of the McNeal-Edwards Company grounded jurisdiction in the Young Company's suit. That the McNeal-Edwards Company, a Virginia corporation, should be permitted to resort, either to a Massachusetts court or to the Massachusetts District Court, without, by necessary implication, thus authorizing valid service on its attorney in a counter-suit against it, seems to me utterly unsound.

I am also unable to assent to the majority views with relation to set-off. Set-off is a fairly broad term. It applies as much to executions in separate suits as to counterclaims pleaded in defence. G. L. Mass. chap. 235, s. 27; 34 Cyc. pp. 625, 627, 628; Cook v. Mills, 5 Allen, 36. Statutes [fol. 124] have extended the right. Compare Waterman Set-off, p. 2. Perry v. Pye, 215 Mass. 403, 413, 414 and authorities cited.

I find nothing in the cases, cited in the last paragraph on page 11 of the majority opinion, inconsistent with the prior holdings in this District and the views I have expressed. Riverside Mills v. Menefee, 237 U. S. 189, simply holds that service on a resident director of the defendant corporation, which was not doing business in North Carolina, did not ground jurisdiction in North Carolina under the 14th Amendment and under Pennoyer v. Neff, 95 U. S. 714.

I concur with my associates that the attachment under a special precept, and not on the original writ, was no legal basis for jurisdiction. The fairly technical decision in Roberts v. Anheuser Busch Co., 215 Mass. 341, is binding on us. I also agree that the defendant corporation was not

so doing business in Massachusetts as to ground service under the doctrine of International Harvester Co. v. Kentucky, 234 U. S. 579. See also Rosenberg Co. v. Curtis Brown Co., 260 U. S. 516.

But the ruling of no jurisdiction under the statutes, supra, is of far reaching importance; it overturns a practice generally regarded as long settled.

The results of this ruling are open to the same condemnation aptly stated by Mr. Justice Miller in Partridge v. The Insurance Company, 15 Wall. 573, at 580, as follows:

"It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held and escape the liability which the laws of the state have attached to all plaintiffs of allowing just and legal set-offs and counter claims to be interposed and tried in the same suit and in the same form (forum?)."

A true copy.
Attest:
Arthur I. Charron, Clerk. (Seal United States Circuit Court of Appeals, First Circuit.)

[fol. 125] In United States Circuit Court of Appeals

[Title omitted]

Clerk's Certificate re Petition for Appeal

I, Athur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that on September 12, 1930, a Petition for Appeal to the United States Supreme Court, Assignment of Errors, Bond on Appeal and Præcipe were filed by Frank L. Young Company, and that on September 16, 1930, said petition for appeal was denied as follows:

"The question of the validity or constitutionality of the state statute is not presented in the case and was not decided. This being so no right of appeal to the Supreme Court exists, and the application for an appeal is denied. The petitioner, however, may present its application to the

Supreme Court for allowance, accompanying the same with a copy of this paper. Otherwise it should apply for certiorari.

George H. Bingham, U. S. Circuit Judge.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this eighteenth day of September, A. D. 1930.

Arthur I. Charron, Clerk. (Seal United States Circuit Court of Appeals, First Circuit.)

[fol. 126] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 127] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,412. U. S. Circuit Court of Appeals, First Circuit. Term No. 490. Frank L. Young Company, petitioner, vs. MeNeal-Edwards Company. Petition for a writ of certiorari and exhibit thereto. Filed September 29, 1930. File No. 35,412.